Supreme Court, U.S.
FILED
00-785 NOV 14 2000
OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

STAN HABR,
Petitioner,

VS.

WORLD SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION TWO

WILLIAM M. LUKENS*
LUKENS AND DRUMMOND
One Maritime Plaza, Suite 1600
San Francisco, CA 94111
Telephone: (415) 433-2261

Attorneys for Petitioner

*Counsel of Record

37 pp

QUESTIONS PRESENTED

1. Must procedural due process under the Fourteenth Amendment be accorded to private arbitrations ordered under state law?

2. Does California Code of Civil Procedure Section 1286.2 violate the Due Process Clause of the Fourteenth Amendment by limiting procedural review of arbitrations to extrinsic fraud?

3. Is it a violation of the Due Process Clause to imply a claim for attorneys fees in favor of a prevailing party in an arbitration?

TABLE OF CONTENTS

Page

Table of Authorities iii

Opinions and Orders Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2

A. Preliminary Statement 2

B. Background 3

C. Procedural History 3

Reasons for Granting the Writ 5

A. Due Process Should Be Accorded to Private Arbitrations Ordered under State Law 5

B. California Code of Civil Procedure Section 1286.2 Violates the Fourteenth Amendment of the United States Constitution 7

C. Due Process Requires an Identification or Pleading of Claims before They Are Decided by an Arbitration Panel 7

Conclusion 8

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 6

Circuit City Stores, Inc. v. Adams, *U.S. Supreme Court Docket* No. 99-1379 5

Commonwealth Corp. v. Casualty Co., 393 U.S. 145 (1968) 6

Truax v. Corrigan, 257 U.S. 312 (1921) 6

Tumey v. Ohio, 273 U.S. 510 (1927) 6

Constitution, Statutes and Rules

U.S. CONST., amend. XIV, § 1 2

CAL. CODE OF CIVIL PROCEDURE §1286.2 4,5,7

No.

In the Supreme Court
OF THE
United States

STAN HABR,
Petitioner,

VS.

WORLD SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION TWO

Petitioner and plaintiff Stan Habr respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeal, First Appellate District (per J. Anthony Kline, P.J.) filed on May 29, 2000, on which review was denied by the California Supreme Court on August 16, 2000.

OPINIONS AND ORDERS BELOW

The opinion to which this Petition is addressed is an unreported opinion of Division Two of the First Appellate District of the California Court of Appeal affirming the judgment of the trial court confirming an arbitration award in favor of respondent World

Savings And Loan Association. The opinion is reproduced in Appendix A. The order of the Supreme Court of the State of California denying review is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeal was entered on May 29, 2000. A timely petition for review was denied by the California Supreme Court on August 16, 2000. This petition for certiorari is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

1. The Due Process Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

[N]or shall any State deprive any person of . . . property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

This Petition questions whether due process should be accorded in a state ordered private arbitration in which the panel awarded attorneys fees of over $320,000, in favor of the respondent, World Savings and Loan Association ("World"), and against petitioner and plaintiff, Stan Habr ("Habr"), after World's counsel refused to produce relevant documents and files, where the attorneys fees were not pleaded in the arbitration, where cross examination was curtailed, where the arbitrators improperly shifted the costs of the arbitration to the appellant and various other improprieties.

B. Background

In 1992, Petitioner Stan Habr purchased a 130 unit apartment complex from respondent World in Sacramento, California which resulted in a dispute over misrepresentations made by World. Mr. Habr believed that World had substantially misstated the number of tenants and their rents.

B. Procedural History

In 1993, World commenced litigation against Mr. Habr by the filing of a foreclosure action in the Sacramento Superior Court. Mr. Habr cross complained for breach of contract and misrepresentations, but only in regard to the misstated list of tenants. After cross complaining in the foreclosure suit, Mr. Habr filed for reorganization under Chapter 11.

In 1994, Mr. Habr stipulated to have the issues in his cross complaint *only* arbitrated before the American Arbitration Association.

In 1995, the bankruptcy court authorized, as part of a confirmed plan of reorganization for Mr. Habr, the filing of an additional action against World in the Superior Court, Alameda County, California for intentional misrepresentations related to the misstated rent revenues. The issue in the new action was not part of the previously stipulated arbitration. Nonetheless, the Alameda Court ordered the new dispute to be decided with the other arbitration claims.

In the course of preparation for the arbitration, World refused to comply with its discovery obligations and failed to produce its principal file on the transaction, 834 pages, until *after* the depositions of the pertinent World witnesses had been completed. Worlds's counsel argued that there was "little" that had not been previously produced. Mr. Habr's counsel argued that he had been

materially prejudiced by his inability to have adequate discovery before the depositions.

In 1997, after a five day hearing, the arbitration panel ruled in favor of World and, *even though attorneys fees had not been pleaded by World*, awarded it over $320,000 in fees as the prevailing party. The award was confirmed by the Alameda Superior Court. Petitioner Habr argued that the award should be vacated under California Code of Civil Procedure Section 1286.2 on the ground that the award had been procured by "undue means," that respondent's attorneys fees were not within the scope of the arbitration, that the arbitrators had refused to hear relevant evidence, that the arbitrators had improperly shifted the costs of the arbitration to him and various other violations of due process.

The California Court of Appeal, Justice J. Anthony Kline, presiding, reviewing the matter de novo, on May 29, 2000, affirmed the award on the ground that the appellant had not demonstrated extrinsic fraud[1] and the panel was authorized to award fees to World, as the prevailing party. The Court refused to consider or apply the broader concept of due process, limiting its review per Section 1286.2 to extrinsic fraud. (Appendix A-17)

---

[1]Code of Civil Procedure Section 1286.4, provides:
...the court shall vacate the award if the court determines any of the following:
(a) The award was procured by corruption, fraud or other undue means...
(d) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted...
(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to ...hear evidence material to the controversy...

On July 6, 2000, petitioner Habr filed a petition for review with the Supreme Court of California. The petition was denied on August 16, 2000. (Appendix B).

REASONS FOR GRANTING THE WRIT

A. Due Process Should Be Accorded to Private Arbitrations Ordered under State Law.

With alternate dispute resolutions ("ADR") steadily replacing our civil court system, it is appropriate and timely to consider whether state mandated private arbitrations must comply with basic Constitutional constraints. Or stated another way, to what extent should the protections of the Due Process Clause of the Fourteenth Amendment be accorded to state directed private arbitrations?

The Supreme Court presently has under submission the issue of whether employees can be required to arbitrate their federally protected employment rights. *Circuit City Stores, Inc. v. Adams*, No. 99-1379. If the Court rules that employees are subject to arbitration, the broader issue of whether states must ensure due process in private arbitrations is ripe for determination.

The Court has previously recognized that elementary requirements of impartiality apply to the selection of unbiased arbitrators. *Commonwealth Corp. v. Casualty Co,*. 393 U.S. 145, 146-150 (1968),reh'g denied, 393 U.S. 1112 (1969). The right to an impartial trier of fact under the Fourteenth Amendment in criminal proceedings had long been recognized in *Tumey v. Ohio*, 273 U.S. 510, (1927). In Tumey, Justice Taft opined:

> But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due

> precess of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

In 1985, this Court confirmed Fourteenth Amendment rights to an unbiased trier of fact in a civil matter in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

No less timely are Justice Taft's remarks on the Due Process Clause in *Truax v. Corrigan*, 257 U.S. 312 (1921), when he said:

> The due process clause requires that every man shall have ... the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously....(page 332)

In *Commonwealth Corp.*, supra, Justice Black noted that:

> ...we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

We now respectfully request the Court to consider the issue of whether a private arbitration ordered by a state judicial court is entitled to procedural due process protections under the Fourteenth Amendment.

We now respectfully request the Court to consider the issue of whether a private arbitration ordered by a state judicial court is entitled to procedural due process protections under the Fourteenth Amendment.

B. California Code of Civil Procedure Section 1286.2 Violates the Fourteenth Amendment of the United States Constitution.

Our case presents the issue directly. Petitioner Habr asserted sweeping violations of due process in the course of his Court ordered arbitration before the American Arbitration Association. The Court of Appeal confined its review under the applicable statute, California Code of Civil Procedure Section 1286.2, to extrinsic fraud. (Appendix A-17) If the statute is so confined, an arbitrated decision can be binding on a litigant even though substantial violations of due process have occurred. Since an ever increasing proportion of the population is now required to resolve their claims through ADR processes, minimum requirements of procedural fairness should be ensured. We submit that Mr. Habr's case presents a timely opportunity to address this issue.

C. Due Process Requires an Identification or Pleading of Claims before They Are Decided by an Arbitration Panel.

Another issue which raised a due process question was the panel's award of over $320,000 when no fee request had been pleaded or identified by World until the day of the hearing. Basic principles of due process would require an adequate warning and identification of such a substantial claim.

Justice Kline ruled that the panel was not acting in excess of jurisdiction because the contract in dispute had a prevailing party attorneys' fee clause, and therefore Mr. Habr should have suspected that such a claim was forthcoming.

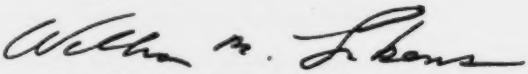
CONCLUSION

There is no denying that more and more civil disputes are being resolved through the ADR process. Perhaps the preponderance of civil matters are now decided in this manner. As this trend continues, it is important that minimal standards of due process are accorded to those whose rights are being decided. It is important that we have faith that a modicum of basic procedural fairness is guaranteed through the Constitution.

We respectfully ask that this petition be granted and that these questions be set for plenary consideration. The Court of Appeal should be instructed to review our appeal under the standards set forth by this Court.

Respectfully submitted,

WILLIAM M. LUKENS
LUKENS AND DRUMMOND
One Maritime Plaza, Suite 1600
San Francisco, CA 94111
Telephone: (415) 433-2261



By WILLIAM M. LUKENS
Attorneys for Petitioners

Dated: November 13, 2000

APPENDIX

Table of Contents

		Page
A	Opinion of California Court of Appeal filed May 29, 2000	1-30
B	California Supreme Court Order Denying Review dated August 16, 2000	31
C	California Code of Civil Procedure §1286.2	32,33

APPENDIX A

Not To Be Published in Official Reports

In the Court of Appeal of the State of California

First Appellate District

Division Two

A084868 (Alameda County
Super. Ct. No. 750274-7)

Stan Habr,
Plaintiff and Appellant,

v.

World Savings and Loan Association,
Defendant and Respondent.

[Filed May 29, 2000]

Stan Habr appeals from a judgment of the trial court confirming an arbitrator's award in favor of World Savings and Loan Association. He contends the trial court erred in confirming the award because the claim upon which it was based was not within the scope of the arbitration, the award was procured by undue means, the arbitrators refused to hear relevant evidence, the arbitrators awarded excessive attorney fees, and the award violated orders of the bankruptcy court.

STATEMENT OF THE CASE AND FACTS

On April 16, 1992, appellant purchased a 130-unit apartment complex in Sacramento, known as the Cadillac South Apartments, from respondent fro $2,995,000. In connection with the sale, respondent loaned appellant $2, 685,000; appellant's promissory note was secured by a deed of trust on the property. The Real Estate Purchase Contract, in paragraph 170, provided

for an arbitration of disputes: "Any dispute or claim in law or equity arising out of this contract or any resulting transaction shall be decided by neutral binding arbitration in accordance with the rules of the American Arbitration Association, and not by court action..."

Appellant defaulted under the terms of the promissory note and deed of trust by failing to make the monthly payment of $20,171.51 due on November 1,1992, and subsequent payments. On January 22, 1993, respondent filed a judicial foreclosure action in the Sacramento County Superior Court. A receiver was appointed on January 29, 1993.

In February 1993, appellant filed a cross-complaint for breach of contract, intentional nondisclosure of material facts, negligent misrepresentation of material facts, recission, interference with prospective business interest, violation of the covenant of good faith and fair dealing, negligent affliction of emotional distress, constructive trust, and exemplary damages. In April 1993, respondent filed a petition to compel arbitration of the claims raised in the cross complaint. This petition was denied without prejudice. Appellant then tried unsuccessfully to enjoin a trustee's sale of the property, which was held on June 4, 1993.

After respondent's demurrer to the cross-complaint was sustained in part and overruled in part on June 8, 1993, appellant filed an amended cross-complaint containing causes of action for breach of contract, intentional nondisclosure of material facts, restitution, and violation of the covenant of good faith and fair dealing. Appellant alleged that respondent had failed to disclose or misrepresented certain facts, including that the City of Sacramento had filed suit against the prior owners of the property for abatement of public nuisance and other causes of action, the property faced demolition if violations enumerated in the city's suit were not corrected within three weeks, four of the complexes required re-roofing, at least 15 of the units were "in an undisclosed state of severe disrepair and dilapidation," and 15 to 20 of the units were not disclosed on the rent roll provided by respondent's agent to be delinquent and/or occupied by tenants

who should not have been permitted to rent and were subsequently evicted for nonpayment of rent.

On July 22, 1993, the parties entered into an agreement under which respondent agreed not to prosecute its judicial foreclosure case and appellant agreed to dismiss his cross-complaint without prejudice, with the claims raised in the cross-complaint to be submitted to an arbitration in accordance with paragraph 17(0) of the contract. Thereafter, appellant dismissed his cross-complaint and, in October 1993, filed a demand for arbitration with the American Arbitration Association (AAA). A panel of three arbitrators was selected, a preliminary hearing was held on January 10, 1994, and arbitration hearing was scheduled to begin on March 30th, 1993, and the parties engaged in discovery.

A dispute arose between the parties regarding the scope of the arbitration when appellant sought to introduce a claim that respondent had negligently loaned him too much money. Respondent took the position that it had agreed to arbitrate only the claims raised in appellant's cross-complaint and that the new claim did not fall within the arbitration clause of the contract because it did not pertain to the real estate purchase but rather to the loan, the documentation of which did not contain and arbitration clause. Respondent informed appellant it would seek to enjoin the arbitrators from hearing the negligent lending issue. Ultimately, the parties agreed to postpone the arbitration hearing until at least August 1994 to allow a determination in superior court as to the arbitrability of the new issue.

On July 22, 1994, appellant filed a petition for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the Northern District of California (*In re Stanley Michael Habr,* Case No. 94-54795-JRG). Thereafter, appellant dismissed his original counsel and retained his current counsel.

In April 1995, appellant and West Valley Charter Line, Inc. (West Valley), a corporation owned and controlled by appellant, instituted the present action by filing a complaint in

Alameda County Superior Court for negligent lending, fraudulent misrepresentation and false advertising.

Both respondent and its parent company, Golden West Financial Corporation, were named as defendants. In the first cause of action, appellant alleged that respondent had advertised the Cadillac South Apartments as having a positive cash flow, with expenses at 40 percent of projected rental income, but knew or should have known it in fact had a negative cash flow which would leave appellant unable to service the loan respondent extended to appellant, and that after acquisition of the property appellant was subjected to a negative cash flow, drain on his resources, and eventually repossession of the property and loss of credit standing. In the second cause of action, appellant alleged that before the sale, respondent misrepresented that the current rent being collected was $41,000 per month, that documentation of expenses for the prior year included as monthly expenses for the prior year included as monthly expenses items that were in fact one-time annual expenses, and that the property was operating at a break-even point and would produce a slightly positive cash flow even after putting the new debt service into place, whereas in fact the rental income was $32,000 per month, the expenses exceeded those portrayed for the prior year, and the cash flow was nowhere near break-even. Appellant alleged that respondent's representations caused him "to proceed to close escrow on the transaction for the purchase of the Cadillac South Apartments." In the third cause of action appellant alleged that respondent's conduct violated Business and Professions Code section 11750.

In response to various demurrers, appellant and West Valley filed first and second amended complaints containing the above three causes of action and adding causes of action for intentional and negligent interference with economic advantage. The allegations of the second and third causes of action, for intentional misrepresentation and false advertising, remained identical to the corresponding allegations of the original

complaint.[2] Each version of the complaint was met with a petition to arbitrate the second and third causes of action, for intentional misrepresentation remained viable and only appellant remained as a plaintiff.

On December 18,1995, respondent's third petition for an order compelling arbitration was granted.

In October 1996, appellant requested additional documents in discovery, which respondent provided in November. Respondent's cover letter referred to "additional documents that have been recently located." On December 13, 1996, respondent produced two files, one of which, the "REO" file regarding the Cadillac South Apartments, appellant claimed had never been produced before. According to the declaration of appellant's counsel, the newly produced file contained 832 pages of documents, including a note from respondent's vice president

---

[2] The second amended complaint contained substantial elaboration of the first cause of action, alleging that respondent advertised the property as having a "40% expense cost", that respondent, in its dual role as lender and seller, was provided with information on the financial status of both appellant and West Valley and had access to income and expense figures for the project, that respondent's dual role allowed appellant to reasonably interpret its approval of the loan as a representation that the value of the property exceeded that of the loan, that respondent knew or should have known of the property's actual negative cash flow and that the purchase would cause severe and immediate financial damage to appellant and West Valley but failed to correct its false advertisement and instead provided further information indicating a positive cash flow, that respondent's employee, in performing an "income and break even analysis" before the closing, was careless and negligent in enumerated respects, and that upon acquisition of the property appellant and West Valley were immediately subjected to huge cash drains on their financial resources which ultimately caused repossession of the property and appellant's bankruptcy.

"directing that no one reveal the actual rental income of the apartment complex to potential purchasers."
In another declaration, appellant's counsel stated that during discovery respondent's counsel had represented they could not locate the loan file related to the Cadillac South Apartments and that after appellant had deposed all of respondent's percipient witnesses, counsel informed appellant they had "located" the file and produced 854 pages of documents. Respondent claimed the production included "a very limited number of documents" that had not been produced previously.

On December 16, 1996, a telephone hearing was held before the panel of arbitrators regarding discovery matters and, among other things, respondent was ordered to produce certain documents prior to the deposition of its custodian of records. The arbitrators subsequently held that James Judd, respondent's executive vice-president, was not required to give deposition testimony. The arbitration hearing, which had been set for January 1997, was postponed at appellant's request to allow for discovery. Respondent made two of its witnesses available to be redeposed; appellant's request to have respondent bear the cost of the additional depositions was denied, and appellant did not take further depositions.

On January 6, 1997, the bankruptcy court confirmed appellant's Sixth Amended Plan of Reorganization. This plan made specific reference to the present litigation in providing for payment of creditors from the proceeds of the arbitration, requiring bankruptcy court approval or any settlement of the arbitration and referring to appellant's agreement with his counsel for representation in the arbitration.

The arbitration hearing took place over the course of six days in late March and early April 1997. The arbitrators issued an interim award finding that appellant had failed to carry the burden of proving fraud, misrepresentation or concealment and failed to prove he relied upon the information he was given by respondent. Respondent was deemed the prevailing party and was directed to file a brief on its claimed entitlement to attorney fees.

On April 30, respondent gave appellate notice that if it prevailed on its request for attorney fees, it would file a motion for an award of an administrative expense priority claim in the bankruptcy case.

In September 1997, the arbitrators issued their award denying appellant's claim, naming respondent the prevailing party, directing appellant to pay to respondent attorney fees and costs in the amount of $309,784.63, including $18,096 in expert witness fees, as well as $8,137.91 for administrative fees and expenses of the AAA, $600 for postponement fees and $37,457.34 for the arbitrators' compensation and expenses. Respondent filed a petition in Alameda County Superior Court to confirm the arbitration award. On October 20, 1997, appellant filed a notice of removal to the federal bankruptcy court, respondent filed a motion for remand and/or abstention. On December 16, 1997, on appellant's motion, the proceeding was transferred to the bankruptcy court's division in San Jose and the judge presiding over appellant's bankruptcy case. By order filed on June 4, 1998, the bankruptcy court exercised its discretion to abstain from hearing the confirmation petition.

Respondent renewed its petition to confirm the arbitration award in superior court. The petition was granted by order filed on August 25, 1998. Judgement was entered on September 23, 1998. Respondent served notice of entry of judgement on October 2, 1998.

Appellant filed a timely notice of appeal on October 29, 1998.

DISCUSSION

"It is well settled that the scope of judicial review of arbitration awards is extremely narrow. (*Moncharch v. Heily & Blase* (1992) 3 Cal. 4th 1...(*Moncharch*); *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9th Cal.4th 362...(*AMD).)* Courts may not review either the merits of the controversy or the sufficiency of the evidence supporting the award. *(Southern Cal. Rapid Transit District. v. United Transportation Union* (1992) 5 Cal.App.4th 416, 422-423...)

Furthermore, with limited exceptions, '...an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.' (*Moncharch ,supra,*3 Cal.4th at p. 6; see also pp. 25-28.)

These rules 'vindicate [] the intentions of the parties that the award be 'final'(*id.* at p.11) and support the "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution ."' (*Id.* at p. 9, quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312,322...)" (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App. 4th 935, 943-944; *Moshonov v. Walsh* (2000) 22 Cal. 4th 771.)

In contrast with the standards governing review of the arbitration award itself, this court reviews the trial court's decision to confirm an arbitration award de novo. *(Lisenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 935, 943-944, *Moshonov v. Walsh* (2000) 22 Cal. 4th 771.)

In contrast with the stands governing review of the arbitration award itself, this court reviews the trial court's decision to confirm an arbitration award de novo. *(Lisenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892,fn. 7; *Advanced Micro Devices, Inc. v Intel Corp., supra,* 9 Cal.4th 362, 376, fn. 9; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

Where the trial court's decision is based upon a determination of disputed factual issues, we review those issues according to the substantial evidence test. (*Lisenstadt, supra,* 55 Cal.App.4th at p. 1527, fn. 2.) Under that test, "the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence,*

or drawing other reasonable inferences, might have reached a contrary conclusion. [Citations.]'" *(Barber v. Rancho Mortgage & Investment Corp.* (1994) 26 Cal.App.4th 1819, 1833, quoting *Bowers v. Bernards.*
(1984) 150 Cal.App.3d 870, 873-874, original italics.)

Code of Civil Procedure section 1286.2[3] lists the exclusive grounds upon which an arbitration award may be vacated. (See, *California Faculty Assn. v. Superior Court, supra,* 63 Cal.App.4th at p. 944.) Appellant relies upon three of these: "The award was procured by corruption, fraud or other undue means" (§ 1286.2, subd. (a)); "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted" (§ 1286.2, subd. (d)); and "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to...hear evidence material to the controversy...."(§1286.2, subd. (e).)[4]

---

[3] All further statutory references will be to the Code of Civil Procedure except as otherwise specified.

[4] The full grounds for vacating an arbitration award are listed in section 1286.2 as follows:

"(a) The award was procured by corruption, fraud or other undue means.

"(b) There was corruption in any of the arbitrators.

"(c) The rights of the party were substantially prejudiced by misconduct of a neutral
arbitrator.

"(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

"(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the

I.

We consider first appellant's claim that the trial court erred in confirming the arbitration award because the intentional misrepresentation claim, the second cause of action in the second amended complaint, was not within the scope of the parties' arbitration agreement. Appellant urges the arbitrators exceeded their authority in determining this claim.

"In determining whether the arbitrators exceeded their powers, courts must give 'substantial deference to the arbitrators' own assessments of their contractual authority....' (*AMD,supra*,9 Cal.4th at p. 373.) A deferential standard is in keeping with the general rule of arbitral finality and ensures that judicial intervention in the process is minimized. (*Ibid.)* 'A rule of judicial review under which courts would independently redetermine the scope of an arbitration agreement already interpreted by the arbitrator would invite frequent and protracted judicial proceedings, contravening the parties' expectations of finality.; (*Ibid.)*....[¶] The Supreme Court recognized in both *Moncharsh* and *AMD*, however, that the parties must be free to fashion agreements which restrict or limit the arbitrator's authority. "'[T]he scope of arbitration is...a matter of agreement between the parties'" (*Moncharsh,supra*, 3 Cal.4th at p.8):'[t]he powers of an arbitrator derive from, and are limited by, the agreement to arbitrate.'(*AMD,supra,*9 Cal.4th at pp. 375-376.) Otherwise, arbitrators would possess the "unusual power" of being able to determine their own jurisdiction and Code of Civil Procedure

---

arbitrators contrary to the provisions of this title.

"(f) An arbitrator making the award was subject to disqualification upon grounds specified in section 1281.9, but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceeding conducted under a collective bargaining agreement between employers and employees or between their respective representatives."

section 1286.2, subdivision (d), would be a nullity. (*AMD, supra,* 9 Cal.4th at p 375, quoting *McCarroll v. L.A. County etc. Carpenters* (1957) 49 Cal. 2d 45, 65-66...'[C]ourts retain the ultimate authority to overturn awards as beyond the arbitrator's powers...' (*AMD,supra,*9 Cal.4th at p. 375.)" (*California Faculty Assn. v. Superior Court, supra,*63 Cal. App.4th at p.944.)

"The right to arbitration depends on a contract. [Citations.] Accordingly, a party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so." (*Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271.) "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate...." [Citations.]" (*Victoria v. Superior Court* (1985) 40 Cal. 3d 734, 744.)

"In determining the scope of an arbitration clause, '[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].' [Citation.]"
(*Victoria v. Superior Court* (1985) 40 Cal.3d at p 744.)
""Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute [Citation.]"' (*Ibid.*)" (*United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021,1026; see, *East San Bernardino County Water Dist. v. City of San Bernardino* (1973) 33 Cal.App.3d 942, 953.)

In the present case, the parties' real estate purchase agreement contained an arbitration clause providing: "Any dispute or claim in law or equity arising out of this contract or any resulting transaction shall be decided by neutral binding arbitration in accordance with the rules of the American Arbitration Association, and not by court action..." Additionally,

in the context of the Sacramento litigation, the parties specifically agreed to submit to arbitration the claims raised by appellant's cross-complaint. Appellant maintains that the latter agreement did not include claims raised in the subsequent Alameda County action. With respect to the contractual provision, appellant urges that respondent is estopped from arguing the intentional misrepresentation claim is arbitrable because respondent refused to allow appellant to introduce new claims into the arbitration of the Sacramento case.

"Whether a party to an arbitration agreement has waived the right to arbitrate is a question of fact, and a trial court's determination on that matter will not be disturbed on appeal if supported by substantial evidence." (*Sobremonte . v. Superior Court* (1998) 61 Cal. App. 4th 980, 991.) Here, the claim in the Sacramento cross-complaint alleged misrepresentations by respondent regarding the physical and financial condition of the apartment complex in connection with the sale of the property to appellant. After these claims were submitted to an arbitration, appellant sought to introduce into the arbitration a new claim that respondent had been negligent in extending its loan to appellant. Respondent took the position that this claim arose from respondent's loan to appellant, the documentation of which did not contain any arbitration agreement, and not from the real estate purchase itself. Although respondent consistently maintained that the negligent lending claim was not within the scope of the parties' arbitration agreement, which was limited to the claims raised in the Sacramento action, it never suggested that the other claims raised in the Alameda complaint were not subject to arbitration. Rather, respondent sought to compel arbitration of the misrepresentation and false advertising causes of action, although not of the negligent lending claim (or of appellant's causes of action for interference with economic advantage)[5] In

---

[5] Appellant's cross-complaint in the Sacramento action contained a cause of action for interference with prospective

short, respondent never attempted to resist arbitration of the claim that it misrepresented facts in the course of the transaction by which it sold the property to appellant. The record thus supports the trial court's implied determination that respondent did not waive its right to arbitration. (See, *Owens v. Intertec Design, Inc.* (1995) 38 Cal.App.4th 72,74 [arbitration agreement must be enforced where no substantial evidence supports trial court's implied finding that grounds existed for revocation of agreement].)

The present case is quite different from those upon which appellant relies. In *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, 221-222, a waiver was found because the party attempting to obtain arbitration had repudiated the validity of the contract upon which the claim to arbitration was based; having repudiated the validity of the contract upon which the claim to arbitration was based; having repudiated the entire contract, the party was held to have necessarily repudiated the arbitration clause contained in the contract. *Grunwald-Marx, Inc. v. Los Angeles Joint Bd. Amalgamated Clothing Workers of America* (1961) 192 Cal.App.2d 268, 277-279, held that a party who had refused to submit an issue to arbitration could not later insist

---

business interest which alleged that respondents failure to extend a deferred payment schedule to appellant, placement of a receiver on the property, and filing of suit "interrupted the process of securing the rehabilitation loan which would have permitted [appellant] to both make the undisclosed repairs and to meet his monthly obligations under the note and deed of trust" and prevented appellant from "going forward with this contemplated business interest". This cause of action did not appear in appellant's amended cross-complaint. The causes of action for interference with economic disadvantage in the Alameda complaint alleged that respondent interfered with the prospective economic advantage of West Valley by interfering with appellant's financial viability and making it impossible for him to guarantee West Valley's financial operations.

upon arbitration of that issue. Here, as has been explained, although respondent sought to prevent arbitration of the negligent lending claim on the theory that it did not arise from the real estate purchase agreement or settlement agreement, it never resisted arbitration of the claims ultimately submitted to arbitration.

Moving beyond the question of waiver, as indicated above, the arbitration clause in the real estate purchase agreement provided for arbitration of "[a]ny dispute or claim in law or equity arising out of this contract or any resulting transaction...".) "[W]here contracts provide arbitration for "any controversy...arising out of or relating to the contract..." the courts have held such arbitration agreements sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims 'have their roots in the relationship between the parties which was created by the contract.' [Citations.]" (*Bos. Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 105.) The intentional misrepresentation claim clearly comes within the arbitration clause of the parties' contract. Indeed, appellant makes no argument to the contrary. Having determined that respondent did not waive its right to arbitration and that the parties' contract required arbitration of appellant's cause of action for intentional misrepresentation, we need not address the question whether intentional misrepresentation claim was also subject to arbitration under the settlement agreement.

II.

Appellant next contends that the arbitration award was procured by undue means. Under section 1286.2, subdivision (a), an arbitration award must be vacated if it was "procured by corruption, fraud or other undue means." Appellant argues that he was deprived of a fair hearing because respondent failed to produce the loan file relevant to the sale of the property until after the appellant had deposed respondent's witnesses, then produced the file which included notes from respondent's vice president directing that no one give the "rents" from the property to potential buyers. Appellant maintains that he could not depose

the vice president because of the late production of these documents and could not afford to re-depose other witnesses.

The only evidence in the record pertaining to this claim consists of the conflicting declarations of the parties' attorneys. According to the declaration of appellant's attorney, respondent's counsel represented during discovery that they were unable to locate respondent's loan file related to the Cadillac South Apartments and only informed him the file had been located after appellant's depositions of the percipient witnesses had been completed. Also according to the declaration, appellant then requested the arbitrators to order respondent to bear the cost of further depositions regarding the newly produced documents, the panel refused this request, and appellant was unable to take further depositions because he lacked the financial resources to do so. The declaration states that the documents belatedly produced included a note from respondent's vice president directing that no one reveal the actual income of the apartment complex to potential purchasers.

The declaration of respondent's attorney states that respondent did not withhold documents during discovery and did not produce 834 pages of "new documents". Rather, according to this attorney, respondent produced documents to appellant's original attorney in the course of the Sacramento action, then produced additional documents in response to the request of appellant's new attorney in the context of the arbitration. After the December 16, 1996, hearing before the arbitration panel on the parties' dispute over document production, respondent provided copies of all its files to appellant; this document production included "a very limited number of documents...that had not been previously produced in 1993." Respondent agreed to make two witnesses available for further deposition, but appellant did not proceed with such depositions.

This issue was presented to the trial court in appellant's request for vacation/correction of the arbitration award. The court's order confirming the arbitration award does not relate the court's reasoning on the issues raised, and no transcript of the

confirmation hearing is included in the record on appeal. In order to confirm the award, however, the trial court necessarily had to reject appellant's argument that the award was procured by undue means, either because it resolved the factual conflict in respondent's favor or because it concluded that the discovery dispute described by the parties was not a proper ground for vacating the arbitration award.[6]

Applying a substantial evidence test to the former ground, we would have to conclude that substantial evidence-respondent's attorney's declaration- supported the trial court's implied findings. (See, *Lisenstadt v. Staff Builders, Inc.,supra,* 55 Cal.App.4th at p. 1527, fn. 2.) So as far as the record discloses, however, the only evidence presented in support or in opposition to the request to vacate consisted of the conflicting declarations of the parties' attorneys. Where the conflicting evidence is all written, we are not bound by the trial court's findings but rather exercise independent judgement. *(Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663.)

---

[6] Respondent relies upon *Hirsch v. Ensign* (1981) 122 Cal.App.3d 521,529, disapproved on other grounds in *Moncharsh,supra,*3 Cal.4th 1, 27-28, for the proposition that a declaration of counsel containing general statements may not be relied upon in reviewing the confirmation of an award in the absence of stipulated facts or some concurrence as to the record before the arbitrator. In *Hirsch,* the petition to vacate the arbitration award was supported by an attorney's declaration that contained only "general statements" while the specific facts upon which the motion was based were set forth in a memorandum of points and authorities. *Hirsch* held that a motion to vacate an arbitrator's award must be accompanied by an affidavit or sworn declaration. Appellant's motion in the present case was accompanied by a declaration and the declaration did set forth the facts upon which the motion was based. Accordingly, the motion in the present case was not deficient in the matter of the one in *Hirsch.*

An arbitration award may be vacated under section 1283.2, subdivision (a), only upon a showing of extrinsic fraud, that is, fraud that deprives a party of fair and impartial hearing to his of her substantial prejudice. (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147.) Here, respondent denies having withheld any documents from appellant during discovery or belatedly produced hundreds of pages of documents that had not previously been provided to appellant, and offered to make its witnesses available for further deposition. Appellant's complaint that he was not made aware of certain documents until after depositions had been completed, he could not afford the cost of further depositions and the arbitrators refused his request to have respondent bear the cost of further depositions is, in essence, an attack on the arbitrator's resolution of the parties' discovery dispute regarding the documents in question. Once a case is submitted to arbitration, of course, the arbitrators are responsible for deciding discovery questions. (*Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 488.) "[A] challenge to an arbitrator's evidentiary rulings or limitations on discovery should not provide a basis for vacating an award unless the error substantially prejudiced a party's ability to present *material* evidence in support of its case. (§ 1283.2, subd. (e).)" (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1110, original italics.) Appellant has made no such showing.

Indeed, the state of the record makes it virtually impossible to evaluate appellant's claim..

As indicated above, the only evidence in the record regarding this claim consists of the parties' attorney's conflicting declarations. Appellant took the deposition of respondent's corporate counsel, Joseph Wynne, on the subject of the "newly-produced file", but the record on appeal does not contain the excerpts from this deposition referred to in appellant's counsel's declaration, making it impossible for this court to consider what information may have been transmitted in this deposition. Issues concerning document production were put before the arbitrators, but the record does not

contain the transcripts or correspondence that would allow this court to meaningfully review the arbitrator's decisions. The arbitrators on December 17, 1996, ordered respondent to produce certain documents identified by reference to a December 10, 1996, letter from appellant's attorney, to the extent in existence and not privileged, but that letter is not included in the record on appeal. Appellant asserts in his brief that the "suppressed file" revealed for the first time the involvement of respondent's executive vice president, James Judd, in the alleged fraud, by indicating the sale was reviewed and approved by Judd and that "reports of [respondent's] strategy in selling the apartment complex" were made Judd personally, but no evidence is cited in support of this assertion.

Accordingly, we are unable to evaluate the arbitrators' decision not to require Judd to submit to deposition. Similarly, appellant asserts in his brief that he first learned at the arbitration hearing that respondent's vice president Carney was specifically assigned to oversee the sale of the property and was responsible for the note directing withholding of rent information, but, again, no evidence is cited in support of this assertion. In the absence of stipulated facts or other concurrence as to the record before the arbitrators, a motion to vacate an arbitrator's award cannot rely upon facts presented not in a sworn affidavit or declaration but solely in a memorandum of points and authorities. *(Hirsch v. Ensign, supra,* 122 Cal.App.3d 521, 529.)

So, on appeal, one party's recitation of facts in a brief may not be the basis for reversing a trial court's judgement. As the party attacking the arbitration award, it is appellant's burden to "affirmatively establish the existence of error by a proper record." (*Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1685.)

Given the state of the record, appellant has failed to demonstrate that respondent's conduct amounted to extrinsic fraud that prevented appellant from presenting his case to the arbitrators.

III.

Appellant next maintains that the trial court erred in confirming the arbitrators' award because the arbitrators refused to hear evidence material to appellant's claim. Under section 1286.2, subdivision (e), an arbitration award must be vacated if "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to...hear evidence material to the controversy..." Appellant complains that the arbitrators refused to order Judd to submit to deposition and refused to permit appellant's attorney to cross-examine the manager of the Cadillac South Apartments, Thomas Harris, who was the author of the rent roll. Appellant sought to establish that the roll was false and that respondent instructed Harris to give it to appellant. According to the declaration of appellant's counsel, at the arbitration hearing the arbitrators ruled that he could not ask Harris "any questions about how the rent roll provided to [appellant] compared to an actual rent roll which had been prepared for internal use by [respondent's] property managers". The declaration states that approximately 30 tenants listed on the rent roll provided to appellant were not listed on the internal rent roll.

The declaration of respondent's attorney again presents a radically different factual scenario. According to that declaration, appellant's attorney did cross-examine Harris about the allegedly fraudulent rent roll, and spent longer on his cross-examination than respondent's attorney spent on the witness' direct examination. This declaration states that on a number of occasions during cross-examination, when Harris stated he could not recall, appellant's attorney continued to ask the same question and the arbitrator "suggested that [counsel] move on to a new topic."

In the absence of a transcript of the arbitration proceedings, these contrary declarations stand as the only evidence of the facts underlying appellant's claim. The superior court, in confirming the arbitration award, impliedly resolved the factual dispute in respondent's favor. Reviewing the matter independently, we are not persuaded that the arbitrators

improperly cut off appellant's questioning. In any event, in order to find the "substantial prejudice" required for vacation of an award under section 1286.2, subdivision (e), " the court must accept, for purposes of analysis, the arbitrator's legal theory and conclude that the arbitrator might well have made a different award had the evidence been allowed." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427,439.) The arbitrators in the present case found not only that appellant failed to prove fraud, misrepresentation and concealment, but also that appellant "failed to prove that he relied on even the information that was furnished him." The arbitrators concluded that "in analyzing the Property's potential," appellant "relied almost exclusively on his own sources of information and experience." Justifiable reliance is an element of intentional misrepresentation. (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474.) In light of the arbitrators' determination on reliance, appellant cannot show that the arbitrators "might well have made a different award had the evidence been allowed." (*Hall v. Superior Court, supra,* 19 Cal.App.4th 439.)

IV.

As indicated above, the arbitrators awarded respondents a total of $309,784.63 in attorney fees and costs. Although respondent's actual fee request is not included in the record on appeal, the parties' arbitration briefs on this issue make clear that the request was for fees incurred in defense of the entire span of the parties litigation, including the Sacramento action, the Alameda action, and the arbitration itself. The arbitrators specifically found that respondent's entitlement was "not restricted to fees and costs directly relating to the arbitration" because the operative provision of the real estate purchase agreement broadly authorized recovery of fees and costs to the prevailing party in "any action, proceeding or arbitration growing out of this agreement."

Appellant maintains the trial court erred in confirming this award of attorneys fees and costs for several reasons. He argues the attorney fees award was excessive, improperly

included fees incurred outside the arbitration proceedings, and violated the federal bankruptcy court's order confirming the appellant's plan of reorganization. He also urges the arbitrators impermissibly awarded expenses for respondent's expert witnesses and shifted the costs of arbitration to appellant.

Appellant's argument that the fee award is excessive and improperly included fees not incurred directly for the arbitration is based on the assumption that the arbitrators were empowered to award fees only for matters that occurred strictly within the confines of the arbitration and not for any portion of the litigation that preceded the arbitration of for trial court proceedings related to the arbitration. He relies upon *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1817-1818 (*DiMarco)*, which he describes as holding that the amount of attorney fees awarded in an arbitration rests solely within the purview of the arbitrator while the amount of fees awarded in related judicial proceedings must be made by the trial court.

In *DiMarco,* the parties' dispute was submitted to arbitration pursuant to an arbitration clause in their contract. Although that contract contained an attorney fees provision identical to that in the present case, the arbitration award denied all requests for fees. The trial court corrected the award and entered a judgement fixing the amount of attorney fees owed to the prevailing party in the arbitration. *DiMarco* upheld the trial court's decision to correct the award, finding that the arbitrator's decision to deny fees despite having found one party the prevailing party exceeded his authority under the contract, which stated that the prevailing party "*shall* be entitled reasonable attorney's fees and costs." (31 Cal.App.4th at p. 1814-1815, original italics.)

The trial court was found to have erred, however, in fixing the amount of fees rather than remanding to the arbitrator. (*Id.* at p. 1816.) With the exception of billings for preparation of the motion to correct the award and review of the opposition to that motion, the fees claimed were for services "at the arbitration level, not in the superior court." *(Ibid.) DiMarco* held the award

of fees incurred in the arbitration proceeding was properly within the arbitrator's purview and that the arbitrator was in the best position to determine the amount of such fees. (*Id.* at pp. 1916-1817.)

DiMarco further addressed the respective spheres of the arbitrator and trial court with respect to fees and costs in rejecting the suggestion that a request for fees in an arbitration must comply with the procedural requisites of section 1033.5, governing allowance of costs in the trial court. As explained in *DiMarco,* section 1293.2, within the title of the Code of Civil Procedure dealing with arbitration, specifies that costs "upon any judicial proceeding under this title" shall be awarded as provided in section 1021 et seq., including section 1033.5. Section 1284.2, by contrast, states that unless the arbitration agreement provides, or the parties otherwise agree, "each party to the arbitration shall pay his pro rata share of the expenses of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit." Thus, "'[i]n arbitration matters, the Legislature has carefully distinguished between costs incurred in the arbitration and costs incurred in superior court to enforce an arbitration award." (*DiMarco, supra,*31 Cal.App.4th at p.1817, quoting *Dickinson v. Kaiser Foundation Hospitals,*(1980) 112 Cal.App.3d 952,954.) Accordingly, *DiMarco* held that a party seeking fees and costs in an arbitration does not have to comply with section 1033.5, while a party seeking to recover in the trial court fees and costs incurred in proceedings to correct, vacate or confirm an arbitration award would have to comply with that statute. (*DiMarco, supra*, 31 Cal.App.4th at p. 1817.)

This latter portion of the *DiMarco* decision discussed procedures applicable to fee requests in arbitration proceedings and trial courts, not arbitrators' or trial courts' power to award fees. Similarly, *Dickinson v. Kaiser Foundation Hospitals, supra,* 112 Cal. App. 3d at p.954, which *DiMarco* quoted on this point, rejected the argument that the prevailing party in an

arbitration proceeding was entitled to costs under section 1032. *Dickinson* held that section 1032 applies to trial courts, noting that the Legislature's different treatment of costs incurred in enforcing an arbitration award in court— with costs to the prevailing party (§§ 1293.2, 1032)-- and costs incurred in the arbitration itself— which are to be shared pro rata absent an agreement to the contrary (§1284.2). (*Dickinson, supra,* 112 Cal. App. 3d at p.954.) *Austin v. Allstate Insurance. Co.* (1993) 16 Cal.App. 4th 1812, 1815-1816, also noted the distinction between section 1293.2, providing for costs to the prevailing party in judicial proceedings to enforce arbitration awards and section 1284.2, setting forth the legislative policy that arbitration costs be borne by the party incurring them absent a contrary agreement. (See also, *Tipton v. Systrom Donner Corp.* (1979) 99 Cal.App. 3d 501, 507-508.) None of these cases deal with arbitrators' power to award fees for trial court proceedings related to an arbitration proceeding.

In discussing the respective spheres of the arbitrator and trial court, *DiMarco* directly addressed only the relatively straightforward situation of a case submitted to arbitration, followed by proceedings to correct, vacate or confirm the resulting award. The present case followed a more complex path, with arbitration entered after a certain amount of litigation in the trial court, additional matters added to the arbitration, again after litigation in the trail court, and multiple proceedings in the trial court to compel arbitration at various stages. Extending *DiMarco's* reasoning to the present case would mean that in determining a reasonable amount of fees and costs for the arbitration, the arbitrators would have had to separate out fees and costs associated with any proceedings in the trial court (including proceedings in the Sacramento action prior to submission to arbitration, and the motions to compel arbitration in the latter action.) The subject matter of these various proceedings overlapped with that of the arbitration; some of these same issues-such as the arbitrability of the negligent lending claims-were disputed in both arbitral and judicial forums, complicating any

assessment of which costs were incurred in which forum. At least some discovery predated the actual arbitration, but may have been utilized in the arbitration. In this situation, a rule strictly limiting the arbitrators to assessment of fees and costs associated with the arbitration would be, at best, difficult to administer.

DiMarco held that a trial court may not determine the amount of fees and costs incurred in arbitration proceedings because "the issue of the *amount* of attorney fees and costs to be awarded for the arbitration proceeding was properly a matter for the arbitrator." (*Id.* At p. 1816, original italics.) It does not necessarily follow that an arbitrator has no authority to award fees and costs incurred at the arbitration level-that is, prior to issuance of the arbitration award-but in a judicial forum. Here, the parties' contract called for an arbitration of any dispute "arising out of this contract" and for attorney's fees and costs to the prevailing party "in any action, proceeding or arbitration arising out of the agreement." This broad language gave the arbitrators authority to fully resolve the controversy, including awarding attorney fees and costs incurred in pursuing the arbitration to its conclusion. Appellant has cited no case directly prohibiting such an award, and we are aware of none.[7]

---

[7] Two recent opinions of our Supreme Court reaffirmed the limited nature of review of arbitrator's awards. (*Moshinov v. Walsh, supra,* 22 Cal. 4th 771; *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782.) Specifically, these decisions held that where the issue of attorney is submitted to arbitration, arbitrators' decisions to deny attorney fees, based on interpretation of the contracts at issue, may not be corrected for errors of law or fact. (*Moshinov, supra,* at p.773; *Moore, supra,* at p.784.) Both cases distinguished *DiMarco* as a case in which the decision to deny fees "conflicted with the explicit and mandatory terms of the agreement." (*Moshonov, supra,* at p.779; see, *Moore, supra,* at p. 788.) Neither case considered *DiMarco's* discussion of the respective spheres of the arbitrator and trial court in determining the amount of attorney

Appellant also contends that the arbitrators' award allowed respondent to pursue a claim for attorney fees against him that had been discharged in bankruptcy. According to appellant, the attorney fees claim arose before the filing of appellant's petition for bankruptcy, at the time the parties entered the contract containing the attorney fees provision, and was discharged upon the confirmation of his reorganization plan due to respondent's failure to file a claim for the fees in the bankruptcy proceedings. Under 11 U.S.C. § 1141, subd. (d) (1), "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan-[¶] (A) discharges the debtor from any debt that arose before the date of such confirmation...whether or not- [¶] (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title; [¶] (ii) such claim is allowed under section 502 of this title; or [¶](iii) the holder of such claim has accepted the plan..." Appellant's plan of reorganization specifies that it is binding upon "any creditor, whether or not the claim of such creditor is impaired under the Plan and whether or not such creditor has accepted the plan," that appellant is "forever discharged from any and all debts that arose prior to the Confirmation Date," except as specified in the plan or held non-dischargeable by the bankruptcy court, and that "[a]ll creditors whose debts are discharged by the Order of Confirmation and all creditors whose judgements are declared null and void by the Order of Confirmation shall be forever enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as liabilities of the Debtor."

Appellant relies upon *In re Abercrombie* (9th Cir. 1998) 139 F. 3d 755. In that case, as here, a real estate agreement provided for attorney fees in favor of the prevailing party in litigation. After winning on a contract claim in the trial court,

---

fees and thus neither sheds additional light on the problem in the present case.

while his opponent's appeal was pending, the debtor filed for bankruptcy. After the bankruptcy proceedings commenced, the trial court victory was reversed on appeal and attorneys fees were ordered in favor of his adversary.

Abercrombie determined that the adversary's claim for attorneys fees should be given priority status in a pending bankruptcy proceeding, but whether the confirmation of appellant's bankruptcy reorganization plan deprived the arbitrators of power to make an award of attorney fees under the parties' contract. *Abercrombie* did not directly deal with the issue of discharge of such claims.

Respondent, by contrast, relies on *Siegel v. Federal Home Loan Mortg. Corp* (9th Cir. 1998) 143 F.3d 525. In *Siegel,* a lender foreclosed on property and sued for a deficiency judgement. Prior to trial, the debtor declared bankruptcy. The lender filed claims relating to the property in the bankruptcy proceeding, to which the debtor did not object. Before the debtor was discharged from bankruptcy, he filed a tort and contract action concerning the foreclosure. After the discharge, the lender obtained summary judgement on the ground that the debtor's suit was precluded by the res judicata effect of the bankruptcy proceeding. *Siegel* affirmed the summary judgement, as the claims in the debtors actions could have been raised as objections to the claims asserted by the lender in the bankruptcy proceeding. It also affirmed the trial court's award of attorney fees to the lender, rejecting the debtor's argument that the claim for fees was discharged in the bankruptcy. (*Id.* at p.533.) In *Siegel,* however, the debtor "had been freed from the untoward effects of contracts he had entered into. [The lender] could not pursue him further, nor could anyone else. He, however, chose to return to the fray and to use the contract as a weapon. It is perfectly just, and within the purposes of bankruptcy, to allow the same weapon to be used against him....[The debtor's] decision to pursue a whole new course of litigation made him subject to the strictures of the attorney's fee provision. In other words, while his bankruptcy did protect him from the results of his past acts, including attorney's

fees associated with those acts, it did not give him carte blanche to go out and commence new litigation about the contract without consequences." (*Id*, at pp. 533-534.)

The present case is similar to *Siegel* in that appellant filed his Alameda County complaint after filing for bankruptcy; it is different in that the arbitration into which the newly raised claim was merged was begun before the bankruptcy filing. The record is inadequate to determine what claim, if any, respondent file in the bankruptcy case. Appellant insists no claim for attorney fees was filed, and his position is supported by the declaration of his attorney stating that to the best of his knowledge no such claim was filed, as well as, implicitly, by the fact that the reorganization plan does not refer to any claim by respondent with respect to the arbitration and by respondent's post-confirmation letter to appellant stating that it *would* file a "motion for an award of an administrative expense priority claim" if it prevailed on its request for fees from the arbitrators.

Respondent states in its brief on appeal that it "filed a timely proof of claim with respect to its attorney fees at issue albeit, at a time when those attorney fees were unsecured and unliquidated," but cites no support for this assertion.[8] Moreover, the record on appeal provides us with no information as to the content of respondent's objections to the bankruptcy plan, the bankruptcy court's reasons for overruling them or that court's reasons for abstaining from hearing respondent's petition to confirm the arbitration award.

---

[8] The reorganization plan does not refer to respondent as a creditor on the "Allowed Secured Claim of World Savings and Loan Association, which claim is secured by a first deed of trust on Debtors Residence." We are aware of nothing in the record that explains the subject of this claim, but respondent's post-confirmation letter announcing a future intention to file a claim for the attorney fees awarded by the arbitrators suggests it had not already made a claim for such attorney fees.

We need not— and, given the state of the record, cannot— determine whether respondent's claim for attorney fees arose pre-or post-petition for purposes of determining whether it was discharged in appellant's bankruptcy. What *is* clear from the record on appeal is that the bankruptcy court, when it approved the reorganization plan, intended the pending arbitration proceedings to continue: The bankruptcy court approved special counsel for appellant to continue the arbitration, the confirmed bankruptcy plan provided for use of the arbitration proceeds to pay creditors, and the plan required approval by the bankruptcy court of any unsettlement of the arbitration. It necessarily follows from the fact that the reorganization plan contemplated continuation of the arbitration that the bankruptcy proceedings did not impair the arbitrators' power to hear the matter. We have been pointed to nothing in the record indication the bankruptcy court imposed any limitation on the arbitrators' power over the dispute. The parties' contract, which, as indicated above, provided for arbitration of the dispute, also provided for reasonable attorney's fee and costs to the prevailing party in "any action, proceeding or arbitration arising out of this agreement." It would make no sense to allow the continuation of an arbitration authorized by the parties' agreement but preclude the arbitrators from effectuating
the attorney fees provision of that same contract.

In the absence of any impediment to the continued prosecution of the arbitration, the arbitrators were empowered to resolve the parties' dispute as specified in their contract. As discussed above, we do not review an arbitration award for errors of fact or law. (*Moncharsh, supra,* 3 Cal. 4th at p. 6, 25-28;*California Faculty Assn. v. Superior Court, supra,* 63 Cal. App. 4th at p. 943-944.

We offer no opinion on the question whether respondent will ultimately be able to collect on the fee award, or whether that award will be determined to have been discharged as a pre-petition debt in some future action to collect upon judgement. The bankruptcy proceeding, however, did not affect the

arbitrators' power to make the award and the trail court did not err in confirming the award.

Finally, appellant urges the trial court erred in confirming the award because the arbitrators had no authority to award respondent $18,096 for the fees paid to its expert witnesses. On this point, we agree. A party entitled to be paid for the costs of arbitration is not entitled to recover the fees of his or her expert witnesses. (*Austin v. Allstate. Insurance. Co, supra,* 16 Cal.App.4th at pp 1815, fn. 2.) Such witness fees are recoverable in the trial court only if the expert witness was ordered by the court. (§ 1033.5, subd. (a) (8), (b)(1).) Absent an agreement to the contrary, each party to an arbitration must bear the costs of his or her own witnesses. (§ 1284.2.) Here, the parties' contract provided for attorney fees and costs to the prevailing party, but did not specifically provide for the expenses of expert witnesses. The contract did specify that arbitration was to be conducted "in accordance with the rules of the American Arbitration Association." The rules of the AAA provide that each party shall pay the expenses of its own witnesses. (AAA Commercial Dispute Resolution Procedures, R-52; Roth, Wulff &Cooper (1999) *The Alternative Dispute Resolution Practice Guide,* § 5.5, p. 5-11.) Respondent has offered no authority to support the arbitrators' inclusion of expert witness fees in the award. Indeed, respondent entirely fails to respond to appellant's argument on this point. We conclude the award of expert witness fees was outside the arbitrators' authority and the trial court erred in confirming that aspect of the award. As the amount awarded for expert witness fees could have been stricken without affecting the merits of the controversy, the trial court should have so corrected the award. (§1286.6, subd. (b).)

DISPOSITION

The judgement is modified to correct the arbitrators' award by striking the $18,096 awarded for expert witness fees and, as so modified, is affirmed.

Kline, P.J.

We concur:

Lambden, J.

Ruvolo, J.

APPENDIX B

First Appellate District, Division Two, No. A084868

S080739

In the Supreme Court of California

[Filed August 16, 2000]

STAN HABR, Appellant,

v.

WORLD SAVINGS AND LOAN ASSOCIATION, Respondent.

Petition for review DENIED.

GEORGE

Chief Justice

APPENDIX C

California Code of Civil Procedure §1286.2. Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was corruption in any of the arbitrators.

(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(f) An arbitrator making the award was subject to disqualification upon grounds specified in Section 1281.9, but failed upon receipt of timely demand to disqualify

himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

Supreme Court, U.S.
FILED
DEC 14 2000
CLERK

(2)

No. 00-785

In The

Supreme Court of the United States

STAN HABR,

Petitioner,

vs.

WORLD SAVINGS AND LOAN ASSOCIATION,
a federally chartered savings and loan association,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District, Division Two

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. ROGAN
Counsel of Record
ROBERT B. KAPLAN
JOSEPH N. DEMKO
JEFFER, MANGELS, BUTLER & MARMARO LLP
One Sansome Street, 12th Floor
San Francisco, CA 94104
Telephone: (415) 398-8080

Attorneys for Respondent World Savings and Loan Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

65 pp

STATEMENT PURSUANT TO RULE 29.6

World Savings and Loan Association is wholly owned by Golden West Financial Corporation, a Delaware Corporation.

TABLE OF CONTENTS

Page

REASONS FOR DENYING THE WRIT 1

STATEMENT OF THE CASE 2

I. THE ALLEGED DUE PROCESS VIOLATIONS RAISED BY HABR IN THE PETITION WERE NOT PRESENTED TO THE CALIFORNIA COURT OF APPEAL AND THUS CANNOT BE REVIEWED BY THIS COURT 3

II. HABR IS ESTOPPED FROM DENYING THAT WORLD WAS ENTITLED TO SEEK AN AWARD OF ATTORNEYS' FEES SINCE HABR HIMSELF SOUGHT SUCH AN AWARD IN THE SUPERIOR COURT ACTION WHICH WAS FILED AGAINST WORLD 5

III. THERE IS NO EVIDENCE IN THE RECORD TO ENABLE THIS COURT TO DECIDE HABR'S CLAIMS THAT HE WAS MATERIALLY PREJUDICED BY HIS ALLEGED INABILITY TO HAVE ADEQUATE DISCOVERY 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 3

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 4

Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) 6

International Billing Services, Inc. v. Emigh, 2000 WL 1721694 No. C028706 (California Court of Appeal, Third Appellate District, Decided November 17, 2000) 5

STATUTES

UNITED STATES CODE 28 U.S.C. § 1257 3

REASONS FOR DENYING THE WRIT

The sole substantive question presented by the Petition filed by Stan Habr ("Habr") is whether due process should be accorded in connection with an arbitration proceeding conducted under state law pursuant to a contract which was executed by Habr and World Savings and Loan Association ("World") which provided for binding arbitration of disputes which arose thereunder. The alleged violations of due process claimed by Habr in the Petition were not raised and/or addressed in the appeal taken by Habr from the arbitration award to the Court of Appeal of the State of California. Therefore, they cannot be considered by this Court.

Further, the Petition should be denied because, as was noted by the California Court of Appeal in its opinion attached as Exhibit A to the Appendix to the Petition, there is no evidence in the record to support much of the procedural history of this case set forth in the Petition about which Habr now complains.

Finally, the Petition should be denied because although Habr complains that the arbitration panel awarded World attorneys' fees, Habr himself sought an award of attorneys' fees in the complaint which he filed against World in the Superior Court of California for the County of Sacramento. Thus, Habr is judicially estopped from contending that World should not have obtained an award of attorneys' fees in connection with the arbitration.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition presents a less than accurate history of Habr's litigation with World. The following additional points need to be recognized by this Court in connection with its consideration of the Petition and World's opposition thereto.

First, the "state ordered private arbitration" about which Habr complains actually arose as a result of Habr's execution of a Real Estate Purchase Contract in favor of World in connection with Habr's purchase of a 130 unit apartment complex located in Sacramento, California. *See* Opinion of the California Court of Appeal attached as Exhibit A to the Appendix to the Petition ("Ct. App. Op."), pp. 1-2. Thus, the Petition's constant reference to "state mandated private arbitrations" is in error, in that the arbitration which is the subject of the Petition was held pursuant to a contract which Habr voluntarily executed with World and in which he agreed to voluntarily arbitrate all disputes arising therefrom.

Second, the various alleged violations of the due process clause of the United States Constitution alleged in the Petition were *not* raised by Habr in opposition to World's Petition filed in the Superior Court for the County of Alameda to confirm the arbitration award rendered against Habr and were not raised to the California Court of Appeal in connection with his appeal of the Superior Court's order confirming the arbitration award. *See* Ct. App. Op., pp. 10-30; and World's Appendix 17-37.

Finally, Habr's Petition neglects to mention that the complaint which he originally filed in the Superior Court

of California for the County of Sacramento that ultimately gave rise to the arbitration award which is the subject of Habr's Petition sought an award of attorneys' fees and costs against World. World's Appendix 51-53.

I.

THE ALLEGED DUE PROCESS VIOLATIONS RAISED BY HABR IN THE PETITION WERE NOT PRESENTED TO THE CALIFORNIA COURT OF APPEAL AND THUS CANNOT BE REVIEWED BY THIS COURT

It is well settled law that this Court will normally not consider a petitioner's federal claims unless those claims were either addressed by or properly presented to the state court whose decision is the subject of the Petition. In *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997), this Court stated as follows with respect to this issue:

> With "very rare exceptions," (citation omitted) we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. (Citations omitted). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. (Citation omitted).
>
> Nor have petitioners met their burden of showing that the issue is properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the

> issue was not properly presented, (citation omitted) and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," (Citation omitted).

Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987), this Court stated as follows with respect to this issue:

> Finally, appellants contend that the Unruh Act is unconstitutionally vague and overbroad. We conclude that these contentions were not properly presented to the state courts. It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." (Citation omitted).

A review of the opinion of the California Court of Appeal attached as Appendix A to Habr's Petition, as well as the brief filed by Habr with the California Court of Appeal which is attached as Appendix A hereto, reveals that the alleged violations of the due process clause of the United States Constitution which serve as the basis of the Petition were not raised by Habr in the California Court of Appeal. In addition, there is no evidence in the Petition that these alleged due process violations were raised in the Petition for Review filed by Habr with the California Supreme Court or to the Superior Court in connection with the actions taken by World to confirm the arbitration award which was rendered against Habr. In light of the foregoing, since these federal

claims were not presented to the state courts below, they should not be considered by this Court at this late date.

II.

HABR IS ESTOPPED FROM DENYING THAT WORLD WAS ENTITLED TO SEEK AN AWARD OF ATTORNEYS' FEES SINCE HABR HIMSELF SOUGHT SUCH AN AWARD IN THE SUPERIOR COURT ACTION WHICH WAS FILED AGAINST WORLD

The Petition also makes much of the fact that World was awarded attorneys' fees by the arbitration panel in excess of $320,000 even though they "had not been pleaded by World." Habr neglects to point out to this Court that the very complaint filed by Habr against World in the Superior Court of California for the County of Sacramento which ultimately lead to an arbitration award being rendered against Habr sought an award of attorneys' fees and costs against World. World's Appendix 51-53.

Under California law, a party who prays for a contractual award of attorneys' fees in his complaint is judicially estopped from subsequently arguing that the contract which gives rise to an award of attorneys' fees should be interpreted not to award attorneys' fees. *International Billing Services, Inc. v. Emigh*, 2000 WL 1721694, pages 7-10, No. C028706 (California Court of Appeal, 3rd Appellate District, Decided November 17, 2000). Since Habr requested an award of attorneys' fees against World in the complaint which he filed which ultimately led up to an arbitration award being rendered against him, Habr should not now be heard to complain that the arbitration

panel awarded World attorneys' fees when World was successful in defeating Habr's claim. In addition, it is worth noting that Habr did not raise as an issue on appeal the claim that the arbitration panel improperly awarded World attorneys' fees because they had not been pleaded by World. World's Appendix 17-37.

III.

THERE IS NO EVIDENCE IN THE RECORD TO ENABLE THIS COURT TO DECIDE HABR'S CLAIMS THAT HE WAS MATERIALLY PREJUDICED BY HIS ALLEGED INABILITY TO HAVE ADEQUATE DISCOVERY

The opinion of the California Court of Appeal affirming the arbitration award noted in several places that there was no evidence in the record to support Habr's claims of his having been prejudiced by decisions made by the American Arbitration Association ("AAA") with respect to discovery issues, but rather only the argument of counsel. Ct. App. Op. pp. 17-18. This Court should defer to the state court's findings of fact with respect to the alleged constitutional violations which Habr contends occurred, since the factual scenario in question involved a civil proceeding where Habr contractually agreed to engage in binding arbitration. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983). In view of the foregoing, since Habr failed to present *evidence* on this issue to the California Court of Appeal, there is certainly no such evidence which could be presented to this Court of the alleged due process violations which occurred by virtue of Habr's alleged inability to obtain discovery prior to the arbitration hearing.

CONCLUSION

For the foregoing reasons, World respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

RICHARD A. ROGAN
Counsel of Record
ROBERT B. KAPLAN
JOSEPH N. DEMKO
JEFFER, MANGELS, BUTLER
& MARMARO LLP
One Sansome Street, 12th Floor
San Francisco, CA 94104
Telephone: (415) 398-8080

Attorneys for Respondent
World Savings and Loan Association

Dated: December 14, 2000

APPENDIX

Table of Contents

Page

A. Appellant's Opening Brief filed by Stan Habr with the California Court of Appeal (without attached exhibits).....App. 1

B. First Amended Cross-Complaint for Breach of Contract, Intentional Non-Disclosure of Material Fact, Restitution and Violation of Covenant of Good Faith and Fair Dealing filed by Stan Habr in the Superior Court of California, County of Sacramento (without attached exhibits).....App. 40

App. 1

CIVIL NO.
A084868

In the Court of Appeal

OF THE

State of California

FIRST APPELLATE DISTRICT
DIVISION TWO

STAN HABR
Plaintiff and Appellant,

VS.

WORLD SAVINGS AND LOAN ASSOCIATION,
Defendant and Respondent.

On Appeal from a Judgment of the Superior Court of the State of California for the County of Alameda
(Case No. 750274-7)
The Honorable Henry E. Needham, Jr., Judge

APPELLANT'S OPENING BRIEF

William M. Lukens (SBN 037196)
Bridget M. Barrett (SBN 188394)
LUKENS AND DRUMMOND
One Maritime Plaza, Suite 1600
San Francisco, CA 94111
Telephone: (415) 433-2261
Facsimile: (415) 781-1034

Attorneys for Plaintiff and Appellant Stan M. Habr

TABLE OF CONTENTS

Page*

I. *INTRODUCTION* 1

II. *ISSUES PRESENTED* 1

III. *STATEMENT OF FACTS* 2

A. The Sacramento Litigation 3

B. The Alameda Action 3

C. Plaintiff Habr's Bankruptcy 4

D. The Arbitration 4

E. The Removal 6

F. Confirmation of the Award 7

IV. *STANDARD OF REVIEW* 7

V. *ARGUMENT* 9

A. The Trial Court Erred by Confirming an Arbitration Award Based On A Claim Not Within the Scope of the Arbitration 9

1. The Agreement to Arbitrate Included Only the Sacramento Litigation Cross-Claims. It Did Not Include the Claims Later Made in The Alameda Action .. 10

2. The Arbitration Clause In the Draft Purchase Agreement Is Unenforceable as to the Intentional Misrepresentation Claim 11

B. The Trial Court Erroneously Confirmed an Arbitration Award Which Was procured by Undue Means 13

*Numbers refer to pages in the original Opening Brief and do not correspond to pages in the appendix.

C. The Trial Court Erred by Confirming the Arbitration Award When the Arbitrators Had Refused to Hear Evidence Relevant to Appellant Habr's Claim 15

D. The Trial Court Erred by Confirming the Arbitrators' Award of Attorneys' Fees and Costs Against Appellant Habr, Because The Arbitrators Exceeded Their Powers in Making the Award 16

1. The Arbitration Panel Awarded Excessive Fees, Including Fees Incurred Outside the Arbitration Proceedings .. 17

2. The Arbitration Panel Impermissibly Awarded World's Expert Witness Fees .. 18

3. The Arbitrators Impermissibly Shifted the Costs of Arbitration to Appellant Habr 19

E. The Arbitration Award Is In Violation of a Federal Injunction and the Bankruptcy Court's Order of Confirmation of Appellant's Plan of Reorganization, and as Such, This Court Cannot Affirm the Award 20

VI. *CONCLUSION* 27

APPENDIX OF NON-CALIFORNIA AUTHORITIES *CITED IN APPELLANT'S OPENING BRIEF*

TABLE OF AUTHORITIES

Page(s)

California Cases

Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362 (1994) 7

American and Nat. Leagues of Prof. Baseball Clubs v. Major League Baseball Players Ass'n, 59 Cal. App. 3d 493 (1976) 20, 24

Austin v. Allstate Ins. Co., 16 Cal. App. 4th 1812 (1993) 17-19

Bayscene Resident Negotiators v. Bayscene Mobilehome Park, 15 Cal. App. 4th 119 (1993) 10

Berman v. Renart Sportswear Corp., 222 Cal. App. 2d 385 (1963) 10

Bertero v. Superior Court, 216 Cal. App. 2d 213 (1963) 12, 13

Black v. Cutter Laboratories, 43 Cal. 2d 788 (1955) 20

Blue Cross of California v. Jones, 19 Cal. App. 4th 2220 (1993) 19

Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Co. of Maryland, 6 Cal. App. 4th 1266 (1992) 10

Brookwood v. Bank of America, 45 Cal. App. 4th 1667 (1996) 7

California Faculty Ass'n v. Superior Court, 63 Cal. App. 4th 935 (1998) 7

Cochran v. Rubens, 42 Cal. App. 4th 481 (1996) 7

Corral v. State Farm Mutual Auto Insurance Co., 92 Cal. App. 3d 1004 (1979) 13

Erofoot v. Blair Holdings Corp., 119 Cal. App. 2d 156 (1960) 9

DiMarco v. Chaney, 31 Cal. App. 4th 1809 (1995)..... 18

Engineers & Architects Assn. v. Community Development Dept., 30 Cal. App. 4th 644 (1994)..... 7

Fontana Teachers Assn. v. Fontana Unified School Dist., 201 Cal. App. 3d 1517 (1988) 10

Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807 (1981) 11

Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers, 192 Cal. App. 2d 268 (1961)..... 12

Hebert v. Harn, 133 Cal. App. 3d 465 (1982)..... 10

Joe A. Freitas & Sons v. Food Packers, Processors and Warehsmn, Local 865, 164 Cal. App. 3d 1210 (1985)..... 20

Kelly v. Tri-cities Broadcasting, Inc., 147 Cal. App. 3d 666 (1983)..... 11

Levy v. Toyota Motor Sales, U.S.A., Inc., 4 Cal. App. 4th 807 (1992)..... 18

Lindenstadt v. Staff Builders, Inc., 55 Cal. App. 4th 882 (1997)..... 7

Meat Cutters Local No. 439 v. Olson Bros., Inc., 186 Cal. App. 2d 200 (1960) 9, 13, 16

Mercury Ins. Group v. Superior Court, 19 Cal. 4th 332 (1998)..... 27

Pacific Crown Distributors v. Brotherhood of Teamsters and Auto Truck Drivers, Local 70, 183 Cal. App. 3d 1138 (1986)..... 11, 13, 15, 16

Pacific Gas and Elec. Co. v. Superior Court, 15 Cal. App. 4th 576 (1993) 20

Rios v. Allstate Insurance Co., 68 Cal. App. 3d 811 (1977) 13

Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519 (1997) 7

Tarver v. State Bar, 37 Cal. 3d 122 (1984) 17

Thompson v. Jespersen, 222 Cal. App. 3d 964 (1990) 16, 17, 19

United Firefighters of Los Angeles v. City of Los Angeles, 231 Cal. App. 3d 1576 (1991) 11

Victoria v. Superior Court (Kaiser Foundation Hospitals), 40 Cal. 3d 734 (1985) 11

Wheeler v. St. Joseph Hospital, 63 Cal. App. 3d 345 (1976) 11, 13

Federal Cases

Christian Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life), 821 F.2d 1370 (9th Cir. 1987) 26

Commonwealth Corp. v. Casualty Co., 393 U.S. 145 (1968) 28

Employees' Retirement Sys. v. Osborne (In re THC), 686 F.2d 799 (9th Cir. 1982) 27

In re Abercrombie, 139 F.3d 755 (9th Cir. 1998) 21, 25-27

In re Madden, 185 B.R. 815 (9th Cir. BAP 1995) 21

Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525 (9th Cir. 1998) 25-27

California Statutes

California Code of Civil Procedure
Section 1033.5 19
Subs. (b)(1) 18, 19
Section 1282(e) 8
Section 1284.2 19
Section 1286.2 ..... 8, 9
Subs. (a) 9, 13
Subs. (d) 9, 11, 18, 27
Subs. (e) 9, 15, 16
Section 1286.4 8
California Constitution, Article I, Section 16 10

Federal Statutes

United States Code, Title 11
Section 1141 25
Subs. (d)(1) 22, 24
Subs. (d)(1)(A) 22
Section 524 ..... 25, 27
Subs. (a)(1) 24
Subs. (a)(2) 24

I.

INTRODUCTION

This appeal arises out of the repeated mishandling of plaintiff and appellant Stan M. Habr's ("Habr") action for intentional fraud in connection with the sale of real property. The trial court erroneously referred Mr. Habr's fraud claim to arbitration at the behest of defendant and respondent World Savings and Loan Association ("World"). The resulting arbitration was plagued by procedural unfairness, prejudicial misconduct by World and the arbitrators' complete disregard for the limits of their authority. Unfortunately, the trial court validated the arbitrators' award, committing reversible error.

II.

ISSUES PRESENTED

A. Did the trial court err by originally referring plaintiff and appellant Habr's intentional misrepresentation claim to binding arbitration, where no agreement to arbitrate that claim existed?

B. Did the trial court err by confirming an arbitration award in favor of respondent World, where World failed to produce key documents during discovery until *after* plaintiff and appellant Habr had taken the depositions of World's witnesses, and where the arbitration panel refused to order World to bear the expense of additional depositions regarding those documents?

C. Did the trial court err by confirming an arbitration award in favor of respondent World, where the arbitration panel refused to allow plaintiff

and appellant to depose a key witness or to cross-examine another regarding central documentary evidence in the case?

D. Did the trial court err by confirming an arbitration award of $320,000 in attorneys' fees and costs in favor of respondent World, where World did not properly request such an award?

E. Did the trial court err by confirming an arbitration award of $320,000 in attorneys' fees and costs in favor of respondent World, where such an award is in direct violation of a federal injunction and the Bankruptcy Court's order confirming plaintiff/appellant's plan of reorganization?

III.

STATEMENT OF FACTS

Plaintiff and appellant Habr takes this appeal from the confirmation of an arbitration award granting approximately $320,000 in attorneys' fees and expenses in favor of respondent World for a four and one-half day arbitration hearing held in March and April of 1997. (Appellant's Appendix ("AA") 0158, 0198.) The arbitration itself arose from World's sale of a 130-unit apartment complex known as the Cadillac South Apartments in Sacramento, California, to appellant Habr on April 16, 1992. (AA 0095, 0002 at ¶ 5.) In addition to arranging the sale of the property to Mr. Habr, World also lent him $2.685 million to purchase the property. (AA 0095).

After Mr. Habr acquired the apartments, he discovered that World had substantially overstated the income and understated the expenses of the apartment complex.

(AA 0002 at ¶ 6.) World's building manager, Thomas Harris, had provided Mr. Habr with a rent roll which contained fictitious tenants and rents. (AA 0096.) Because the actual income and expenses of the Cadillac South Apartments' resulted in a negative cash flow, it became impossible for Mr. Habr to service the $2.685 million loan from the revenues of the complex. (AA 0002 at ¶ 6.) As a result, Mr. Habr defaulted in late 1992. (*Id.*)

A. The Sacramento Litigation

On January 21, 1993, World filed a judicial foreclosure action in the Superior Court for Sacramento County, California, entitled *World Savings and Loan Association v. Habr*, Case No 531746 (the "Sacramento Litigation"). (AA 0002 at ¶ 6, 0052 at ¶ E.) Mr. Habr cross-complained for breach of contract, nondisclosure of material facts, negligent misrepresentation, restitution, and breach of the covenant of good faith and fair dealing, but did not yet include a claim for intentional misrepresentation of the rents. (AA 0014.)

In July of 1993, World agreed to voluntarily dismiss its complaint for judicial foreclosure, in exchange for Mr. Habr's agreement to arbitrate his cross-complaint in the Sacramento Litigation ("Dismissal Agreement"). (AA 0054-56 at ¶¶ 1-3.)

B. The Alameda Action

When Mr. Habr's counsel sought to expand the claims against World in the arbitration, World refused to allow any new causes of action to be added. Instead,

World threatened to obtain an injunction from the Superior Court should Mr. Habr continue to attempt to include a claim not in the existing cross-complaint of the Sacramento Litigation. (AA 0069.)

Accordingly, new counsel for Mr. Habr prepared and filed the new claims in the Alameda Superior Court (the "Alameda Action"). World then completely reversed its position and demanded that the Alameda Superior Court refer to the new claims back to arbitration. (*See* AA 0109.) When Mr. Habr's new intentional misrepresentation claim survived World's demurrers, the Alameda Superior Court then referred it to arbitration. (*Id.*) Plaintiff Habr amended his arbitration claim to include the new action. (AA 0117 at ¶ 8.)

C. Plaintiff Habr's Bankruptcy

While the litigation was pending, on July 22, 1994, Mr. Habr filed for reorganization under Chapter 11 in Division Five (San Jose) of the Bankruptcy Court for the Northern District of California, *In re Stanley Michael Habr*, Case No. 94-54795-JRG. On January 6, 1997, The Honorable James R. Grube confirmed a plan of reorganization in favor of Mr. Habr (the "Plan"), which specifically provided that the Bankruptcy Court would retain jurisdiction over administrative claims against the bankruptcy estate. (AA 0147 at § 11.1.)

World filed repeated objections to the Plan of Reorganization (which specifically provides for the prosecution of the Alameda Action), but never divulged or filed a claim against the estate for attorneys' fees related to the arbitration. Nothing in the Plan permitted World to

recover attorneys' fees or expenses from Mr. Habr. (AA 0133.) In fact, World did not disclose any intention to assert a claim for attorneys' fees in the bankruptcy proceeding until *after* the arbitration hearing. (AA 0153.)

D. The Arbitration

The arbitration was fraught with substantial procedural irregularities and errors. First, the proceedings were delayed because World failed to produce the loan file relevant to the Cadillac South Apartments – a total of 854 pages directly related to the transaction – until after depositions of the percipient witnesses in the case had been completed. (AA 0293 at ¶ 11, 0353 at ¶ 3.) As a debtor emerging from reorganization, Mr. Habr did not have the financial resources to retake the depositions. The American Arbitration Association panel which was assigned to the matter (the "arbitration panel") refused to order World to bear the cost of re-deposing the witnesses. (AA 0293 ¶ 12, 0353 at ¶ 4.) Thus, Mr. Habr was unable to develop evidentiary leads in the suppressed file through the discovery process.

Second, the arbitration panel increased its initial fee demand almost eight-fold, from $12,000 to $80,000, which it required the parties to deposit in advance of the arbitration. (AA 0130.) This outrageous increase in the fee requirement placed a severe burden on the insolvent Mr. Habr, who could not withdraw from the arbitration.[1]

---

[1] Having been compelled to arbitrate the intentional misrepresentation claim against his will, Mr. Habr had no choice but to advance the newly demanded fee deposit, As a Chapter

Third, during the arbitration proceeding, the panel refused to allow cross-examination of World's building manager about the names in a rent roll he had given to Mr. Habr. The panel refused to allow any questions on how the names on the rent roll given to Mr. Habr compared to the names on World's in-house rental roll. This was primary evidence needed to support Mr. Habr's claim of fraud. (AA 0353-54 at ¶ 5.) Without open cross-examination regarding the false entries on the rent roll, Mr. Habr was prevented from showing that Mr. Harris had falsified the list of tenants and related rents. (*Id.*)

On April 7, 1997, the arbitration concluded. Conceding that the rent roll was "subject to interpretation," the panel nonetheless issued an "Interim Award" on April 25, 1997, completely absolving World of any wrongdoing. (AA 0120.) It then ordered further briefing on the issue of attorneys' fees to be paid to World, despite the fact that no demand for such fees had ever been made by World until the arbitration hearing.[2] (AA 0122, 0130 at ¶ 2.) Mr. Habr objected to the panel's jurisdiction even to award attorneys' fees, given that such claims were neither demanded in the arbitration nor mentioned in the Plan of Reorganization, and had not been claimed in the bankruptcy. (AA 0130 at ¶ 2, 0282, 0293 at ¶ 10.) But the panel rejected Mr. Habr's objections and awarded World $309,

---

11 debtor, this new and unexpected financial development placed a tremendous burden on his ability to conduct discovery in the case.

[2] Normally, it is necessary to identify any claim for a monetary award in the demand for arbitration so that the parties are provided with adequate notice. In a court of law, such a claim must be identified in the pleadings.

784.63 in attorneys' fees and expenses. (AA 0334 at ¶ 3.) It also ordered that Mr. Habr pay World's costs of arbitration in the amount of $10,604.17. (*Id.* at ¶¶ 4-5.) On October 6, 1997, World filed its Petition to Confirm Arbitration Award in the Superior Court. (AA 0115.)

E. The Removal

On October 20, 1997, Mr. Habr removed the petition to confirm the award to the United States Bankruptcy Court for the Northern District of California, Division Four, pursuant to 28 U.S.C. section 1452 and Bankruptcy Rule 9027. (AA 0127.) World brought a Motion for Remand and/or Abstention in that Court on or about November 12, 1997. The matter was transferred to San Jose in December 1997, for consideration by the court presiding over Mr. Habr's underlying bankruptcy case. (AA 0261.) Finding that the lack of a formal judgment prevented the Court from considering the propriety of any award against debtor Habr, the Honorable James R. Grube granted World's motion to abstain, after obtaining World's promise that any award that might issue against the debtor must be brought to the Bankruptcy Court for review and approval. (AA 0263.)

F. Confirmation of the Award

World renewed its petition to confirm the arbitration award in the Superior Court on June 11, 1998. (AA 0267.) Mr. Habr opposed the petition and requested vacation or correction of the award. (AA 0270.) On August 25, 1998, Judge Needham confirmed the arbitration award. (AA 0355.) Judgment was entered on September 23, 1998. (AA

0360.) World gave notice of the judgment's entry on October 2, 1998, (AA 0358,) and plaintiff Habr filed his Notice of Appeal within thirty days of the Notice of Entry. (AA 0363.)

IV.

STANDARD OF REVIEW

On appeal from an order confirming an arbitration award, the appellate court reviews the trial court's order *de novo*. *Lindenstadt v. Staff Builders, Inc.*, 55 Cal. App. 4th 882, 892 n.7 (1997); *see also Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 376, fn.9 (1994); *California Faculty Ass'n v. Superior Court*, 63 Cal. App. 4th 935, 945 (1998); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1527 (1997); *Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1670 (1996). "To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues." *Lindenstadt*, 55 Cal. App. 4th at 892 n. 7; *see also Cochran v. Rubens*, 42 Cal. App. 4th 481, 484-486 (1996); *Engineers & Architects Assn. v. Community Development Dept.*, 30 Cal. App. 4th 644, 653 (1994). Thus, on appeal, the court re-evaluates the propriety of the arbitrators' decision anew.

In California, the standard for review of an arbitration award is statutory. Section 1286.2 of the Code of Civil Procedure provides as follows:

Subject to Section 1286.4[3] the court shall vacate the award if the court determines any of the following:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was corruption in any of the arbitrators.

(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(f) An arbitrator making the award was subject to disqualification upon grounds specified in subdivision (e) of Section 1282, but failed upon receipt of timely demand to disqualify himself or herself as required by those provisions. However, this subdivision does not apply to arbitration proceedings conducted under a collective

---

[3] That section lists the procedural prerequisites for vacation of an arbitration award, which are not at issue in this case. Cal. Code Civ. Proc. § 1286.4.

> agreement between employers and employees or between their respective representatives.

Cal. Code Civ. Proc. § 1286.2.[4]

If any of the above conditions exist, the court must vacate the arbitrator's award. *Id.* Not only was the arbitration award procured by undue means (*see* § 1286.2(a)), but the arbitrators refused to consider evidence highly relevant to Mr. Habr's claim (*see* § 1286.2(e)) and the award that was entered exceeded the arbitrators' powers (*see* § 1286.2(d)). The arbitration award must be vacated.

V.

ARGUMENT

A. The Trial Court Erred by Confirming an Arbitration Award Based On A Claim Not Within The Scope of the Arbitration.

Mr. Habr's intentional misrepresentation claim against World was *not subject to an arbitration agreement.* Therefore, the award issued should have been vacated as outside the proper scope of the arbitration. *See Meat Cutters Local No. 439 v. Olson Bros., Inc.*, 186 Cal. App. 2d 200, 204 (1960) ("[T]he court will modify or vacate an award embracing matters not properly submitted to the arbitrator."). *See also Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d 156, 182 (1960), *disapproved on other grounds, Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 183 (1961). The trial court erred by confirming the arbitration award.

---

[4] All statutory references herein are to the California Code of Civil Procedure unless otherwise indicated.

1. The Agreement to Arbitrate Included Only the Sacramento Litigation Cross-Claims. It Did Not Include the Claims Later Made in The Alameda Action.

"The right to arbitration depends on a contract." *Boys Club of San Fernando Valley, Inc. v. Fidelity and Deposit Co. of Maryland*, 6 Cal. App. 4th 1266, 1271 (1992). "Accordingly, a party can be compelled to submit a dispute to arbitration *only where he has agreed in writing to do so.*" *Id.* (emphasis added); *see also Fontana Teachers Assn. v. Fontana Unified School Dist.*, 201 Cal. App. 3d 1517, 1521 (1988); and *Berman v. Renart Sportswear Corp.*, 222 Cal. App. 2d 385, 388 (1963).

Unless a litigant has agreed to arbitrate his or her claim, compelling binding arbitration violates his or her constitutional right to due process. *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 134-35 (1993). It further deprives the litigant of his or her "inviolate" right to trial by jury under the California Constitution. Cal. Const. art I § 16; *See Hebert v. Harn*, 133 Cal. App. 3d 465, 468, 69 (1982) (holding unconstitutional a superior court local rule preventing trial de novo after compelled arbitration).

Plaintiff Habr did *not agree* to arbitrate his intentional misrepresentation claims against World. To the contrary, plaintiff Habr only agreed to arbitrate his cross-claims *in the Sacramento Litigation*, in exchange for dismissal of World's foreclosure action. (AA 0055-56 at ¶ 3.)[5] Because

---

[5] After entering into the stipulation to arbitrate the cross-claims, World immediately conducted a non-judicial foreclosure sale of the apartment complex.

the arbitration agreement pre-dates the Alameda Action and does not include any claims other than Mr. Habr's Sacramento cross-complaint, it *cannot* be the basis for compelling arbitration of the intentional misrepresentation claim brought in Alameda. *See Victoria v. Superior Court (Kaiser Foundation Hospitals)*, 40 Cal.3d 734, 744 (1985) (arbitration agreement not to be construed so as to compel arbitration of controversies which parties have not agreed to arbitrate). The Court erred by forcing the intentional misrepresentation claim to arbitration, and the arbitrators exceeded their powers in deciding that cause of action.[6] *Id.*, *Pacific Crown Distributors v. Brotherhood of Teamsters and Auto Truck Drivers, Local 70*, 183 Cal. App. 3d 1138, 1146 (1986). Under section 1286.2(d), the arbitration award must be reversed. *Pacific Crown Distributors*, 183 Cal. App. 3d at 1146.

---

[6] "A party who has been compelled to submit to court-ordered arbitration is entitled to have the validity of that order reviewed on his appeal from a 'judgment confirming an award.' " *Kelly v. Tri-cities Broadcasting, Inc.*, 147 Cal. App. 3d 666, 672 (1983). *See also Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 811 n. 1 (1981); *Wheeler v. St. Joseph Hospital*, 63 Cal. App. 3d 345, 353 (1976). Moreover, an objection to subject matter jurisdiction – such as the power of an arbitration panel to consider an issue – may never be waived. *See United Firefighters of Los Angeles v. City of Los Angeles*, 231 Cal. App. 3d 1576, 1582 (1991). Thus, this Court is free to consider the question at this time.

2. The Arbitration Clause In the Draft Purchase Agreement Is Unenforceable as to the Intentional Misrepresentation Claim.

Because the stipulation to arbitrate the Sacramento Litigation cross-complaint does not include the Alameda claims, the only possible basis for compelling arbitration of the intentional misrepresentation claim is the initial purchase contract for the sale of Cadillac South Apartments. (AA 0046.) World Savings expressly agreed that the Dismissal Agreement was to be a complete integration of their agreement to arbitrate, and made no provision for arbitration beyond the causes of action stated in the cross-complaint in the Sacramento Litigation. (AA 0055-56 at ¶ 3, 0056-57 at ¶ 5c.)

Defendant World is estopped to argue that the new claim is subject to arbitration because when Mr. Habr's then-attorney sought to bring additional claims, World refused to allow the new claims to be included and threatened to enjoin Mr. Habr's counsel if he attempted to arbitrate.[7] (AA 0069.)

---

[7] Mr. Demko, World's counsel, wrote, "It seems to me that the language of the agreement makes it clear that what is being arbitrated, and what World has agreed to arbitrate are the claims set forth in the first amended cross-complaint [of the Sacramento Litigation]. There is no allegation in the first amended cross-complaint that in any way can be construed as a claim that World should not have made the loan to Mr. Habr to allow him to acquire the property." Mr. Demko then threatens an injunction in the event that Mr. Habr's counsel causes the arbitrators to consider any claims other than "those claims set forth in Mr. Habr's first amended cross-complaint." (AA 0068-69.)

A party that repudiates arbitration cannot later reverse its position and force the opposing party to arbitrate. *Bertero v. Superior Court*, 216 Cal. App. 2d 213, 221-222 (1963); *Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers*, 192 Cal. App. 2d 268, 277-79 (1961). In reliance on the repudiation, the other party to the agreement must be permitted to bring suit in state court instead. *Bertero*, 216 Cal. App. 2d at 221-222. It is an abuse of discretion to compel arbitration in the face of such a repudiation. *Id.* at 222.

In this case, counsel for World insisted that Mr. Habr not file any new claims in the arbitration. (AA 0064-65, 0067-69.) It threatened to sue Mr. Habr's counsel in the event that the new claims were included in the arbitration. (AA 0069.) In so doing, World repudiated its right to arbitrate any claim not subject to the Dismissal Agreement. *Bertero*, 216 Cal. App. 2d at 220-222 (right to arbitration repudiated in letter from one party to the other). Mr. Habr should have been allowed to pursue his new claims in the Superior court. The intentional misrepresentation claim *was not* in the Sacramento Litigation. Nor was it properly compelled to arbitration. Thus, the arbitrators' award on that claim *must be vacated*. *Meat Cutters*, 186 Cal. App. 2d at 204. *See also Graham*, 28 Cal. 3d at 831; *Wheeler*, 63 Cal. App. 3d at 372-73 (reversing confirmation of award and ordering vacation where claim improperly referred to arbitration in absence of valid agreement to arbitrate).

B. The Trial Court Erroneously Confirmed an Arbitration Award Which Was Procured by Undue Means.

Under section 1286.2(a) of the Code, an arbitration award which is "procured by corruption, fraud or other undue means" must be vacated. Cal. Code Civ. Proc. § 1286.2(a). This section applies to the misconduct of a party as well as that of an arbitrator. *Pacific Crown Distributors,* 183 Cal. App. 3d at 1147; *see also Corral v. State Farm Mutual Auto Insurance Co.,* 92 Cal. App. 3d 1004, 1012-1014 (1979); *Rios v. Allstate Insurance Co.,* 68 Cal. App. 3d 811, 818-819 (1977).

In this case, respondent World repeatedly refused to comply with plaintiff's basic discovery requests. Most strikingly, World failed to produce the central loan file relevant to World's sale of Cadillac South Apartments until *after* Mr. Habr had already taken the depositions of World's percipient witnesses. World's attorneys claimed that until December of 1996 (after the depositions had taken place and just prior to the arbitration), there were no other files, and that all files had already been produced for inspection. The suppressed file included notes from the vice president of World directing that no one give the "rents" of Cadillac South Apartments to any potential buyer. The notes were critical evidence which could have proved that World had concealed the actual performance income performance of the property. But because of the lateness of the production, the vice president making the remark could not be deposed.

In December of 1996, after its witnesses had been deposed, World suddenly "found" 854 pages of loan files,

including the aforementioned note. (*See* AA 0293 at ¶ 11.) But Mr. Habr had already deposed World's witnesses at this stage and he did not have the means to repeat the depositions. Nor was Mr. Habr allowed to take the deposition of World's executive vice president, James Judd, whose involvement in the fraud alleged by Mr. Habr was only revealed by the suppressed file.[8] (AA 0111.) Plaintiff Habr was unable to question World's remaining witnesses about the documents, or to cross-examine World's building manager who had falsified the rent roll, until the arbitration hearing. (AA 0293 at ¶¶ 11-12, 0353-54 at ¶ 5.) Not only was Mr. Habr denied reasonable access to important witnesses and evidence in the case, but he was "depriv[ed] of a fair and impartial hearing to [his] substantial prejudice."[9] *Pacific Crown Distributors*, 183 Cal.

---

[8] The suppressed file revealed that the sale had been reviewed and approved by Mr. Judd and that reports of World's strategy in selling the apartment complex were being made to Mr. Judd personally. Nevertheless, the arbitration panel oddly refused to compel his attendance at a deposition. (AA 0111).

[9] Only at the arbitration hearing was it finally revealed by World Vice President Reed that the overseeing of the sale had been specially assigned to a Mr. Carney, a vice president of World's located in the Upland-Ontario area of Southern California. It was his cryptic notation in the suppressed file not to "give the rents" to anyone that led to the revelation of his special status at the hearing. But, it was too late to procure his testimony. Mr. Carney's involvement was highly relevant to the fraud issue and was deftly suppressed by the withholding of the file. We doubt that this type of stonewalling would have succeeded had the case ben [sic] administered by an experienced judicial officer, who could have compelled attendance at the trial. Arbitration was simply not a suitable forum for this type of problem.

App. 3d at 1147. The arbitration award should be vacated on this basis alone. *Id.*; Cal. Code Civ. Proc. § 1286.2(a).

C. The Trial Court Erred by Confirming the Arbitration Award When The Arbitrators Had Refused to Hear Evidence Relevant to Appellant Habr's Claim.

Section 1266.2(e) provides that an arbitration award must also be vacated if "[t]he rights of a party were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy. . . . " Cal. Code Civ. Proc. § 1286.2(e). In the present case, the arbitration panel not only refused to order Mr. Judd's participation, but also refused to permit counsel for plaintiff Habr to cross-examine World's primary witness regarding the false rent roll which was provided to plaintiff Habr prior to the sale. (AA 0353-54 at ¶ 5.) World's transmission of this rent roll to Mr. Habr was the heart of his intentional misrepresentation claim. Mr. Habr alleged that the rent roll was false, that World *knew* it was false, and that World gave it to Mr. Habr with the intention of inducing him to purchase an investment property which was in financial distress. (AA 0081-82 at ¶¶ 89-90.)

The witness, Thomas Harris, was the manager of the Cadillac South Apartments and the author of the bogus rent roll. Counsel for Mr. Habr needed to cross-examine Mr. Harris to establish not only that the rent roll was false when it was made, but that World had instructed him to give the rent roll to Mr. Habr in its false form. Without that testimony, plaintiff was hamstrung in proving his

intentional misrepresentation claim. In fact, this was the critical issue in the case.

The parties to an arbitration "have the right to assume that any arbitration hearing in which they become involved . . . will afford them the opportunity of presenting *all* of their material evidence and that the Arbitrator, before closing the hearing will inquire of all parties whether they have any further proofs to offer or witnesses to be heard." *Pacific Crown*, 183 Cal. App. 3d at 1147-48 (*quoting Harvey Aluminum, Inc. v. United Steelworkers of America*, 263 F.Supp. 488, 492 (C.D. Cal. 1967)) (emphasis added, internal quotes and original italics omitted). "[T]he focus . . . is upon whether the protesting party had an opportunity to discover and reveal the purported fraud at the arbitration hearing." *Pacific Crown*, 183 Cal. App. 3d at 1148 (*quoting Biotronik, Etc. v. Medford Medical Instrument Co.*, 415 F.Supp. 133, 138 (D.C.N.J. 1976)) (internal quotes and italics omitted). In this case, the arbitrators unfairly and prejudicially deprived Mr. Habr of the opportunity to present vital evidence supporting his intentional misrepresentation claim. The arbitration award should therefore be vacated. Cal. Code Civ. Proc. § 1286.2(e).

D. The Trial Court Erred by Confirming the Arbitrators' Award of Attorneys' Fees and Costs Against Appellant Habr, Because The Arbitrators Exceeded Their Powers in Making the Award.

It is well established that an arbitrator "cannot bind the parties with an award based on an issue or dispute

not properly submitted to him." *Thompson v. Jespersen*, 222 Cal. App. 3d 964, 967 (1990) (reversing confirmation of arbitration award where arbitrators improperly awarded attorneys' fees). *See also Victoria v. Superior Court*, 40 Cal. 3d at 739; *Meat Cutters*, 186 Cal. App. 2d at 204. Where the arbitration award impermissibly shifts fees and/or costs to one party, reversal is warranted. *Thompson*, 222 Cal. App. 3d at 967 (attorneys' fees); *Austin v. Allstate Ins. Co.*, 16 Cal. App. 4th 1812, 1815 (1993) (costs of arbitration). In this case, the arbitrators improperly ordered that Mr. Habr pay $252,139.49 in attorneys' fees,[10] plus $57,645.14 for the cost of the arbitration, including World's expert witness fees. (AA 0337.) Thus, the trial court erred in failing to set aside the award, and its decision should be reversed.

1. The Arbitration Panel Awarded Excessive Fees, Including Fees Incurred Outside the Arbitration Proceedings.

As Mr. Habr contended in the arbitration, there was no basis for the arbitrators to award attorneys' fees to World. In fact, World did not even request such an award until submission of an arbitration brief just prior to the arbitration hearing. (AA 0122, 0130 at ¶ 2.) Once the arbitration panel had made a decision in favor of World, it allowed World to submit a request for an award of over

---

[10] The arbitration panel arrived at this number rather randomly, awarding World seventy-five percent of the fees it requested, minus approximately $1700 which was incurred while World pursued its claim in Mr. Habr's bankruptcy case. (AA 0337.)

$335,000 in attorneys' fees, and eventually awarded over $250,000 of the fees requested.

The award of $250,000 in attorneys' fees allegedly incurred in connection with an arbitration which lasted fewer than five days is " 'so exorbitant and wholly disproportionate . . . as to shock the conscience.' " *Tarver v. State Bar*, 38 Cal. 3d 122, 134 (1984) (*quoting Herrscher v. State Bar*, 4 Cal. 2d 399, 401-402 (1935), *quoting from Goldstone v. State Bar*, 214 Cal. 490, 498 (1931)) (internal quotes omitted). There is no doubt that the award is excessive, bearing no relation to an effort reasonably to be expended by counsel for World in connection with the arbitration. It should have been vacated by the trial court *See Levy v. Toyota Motor Sales U.S.A., Inc.*, 4 Cal. App. 4th 807, 814-15 (1992) ("Anchoring the analysis of reasonableness to this concept is the only approach that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts" (*quoting Aetna Life & Casualty Co. v. City of Los Angeles*, 170 Cal. App. 3d 865, 880-881 (1985) (internal quotes omitted))).

Moreover, the arbitrators consciously overreached by granting fees outside the permissible scope of their award. Less than half of the fees claimed by World were represented to have been incurred in connection with the arbitration itself. Undaunted, the arbitrators awarded over $250,000 in attorneys' fees, specifically finding that "Respondent's entitlement is not restricted to fees and costs directly relating to the arbitration." (AA 0337.)

An arbitration panel may not award attorneys' fees incurred outside the arbitration proceeding itself. *DiMarco v Chaney*, 31 Cal. App. 4th 1809, 1817-18 (1995)

(amount of attorneys' fees awarded in connection with arbitration solely within purview of arbitrator, while award of fees resulting from related judicial proceedings to be made by trial court). It is clear that a grant of fees incurred outside the arbitration is in excess of the arbitrator's powers, and cannot be confirmed. Cal. Code Civ. Proc. § 1286.2(d).

2. The Arbitration Panel Impermissibly Awarded Word's Expert Witness Fees

The arbitrators also awarded $18,096.00 in fees paid to expert witnesses by World. (AA 0337.) However, expert fees may not be recovered as a cost of suit, whether in court or in an arbitration. Cal. Code Civ. Proc. § 1033.5(b)(1); *Austin v. Allstate Ins. Co.*, 16 Cal. App. 4th at 1815 n. 2. Section 1033.5 of the Code prohibits such an award, providing as follows in relevant part:

> (b) The following items are not recoverable as costs, except when expressly authorized by law:
> (1) Fees of experts not ordered by the court.

Cal. Code Civ. Proc. § 1033.5(b)(1).

There was no such law authorizing the award of expert witness fees operating in this case. By awarding expert witness fees in direct contravention of California law, the arbitrators exceeded their powers yet again. *See Blue Cross of California v. Jones*, 19 Cal. App. 4th 220, 229 (1993) (reversing confirmation of arbitration award where damages awarded not permitted under agreement between parties); *Thompson*, 222 Cal. App. 3d at 967 (reversing confirmation of attorneys' fee award where no

legal authorization for award existed). Thus, the trial court erred by confirming the award.

3. The Arbitrators Impermissibly Shifted the Costs of Arbitration to Appellant Habr.

Section 1284.2 of the Code of Civil Procedure provides:

> Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise, agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.

Cal. Code Civ. Proc. § 1284.2.

In the absence of an agreement to the contrary, an arbitrator may not shift the cost of an arbitration from one party to another. *Austin v. Allstate Ins. Co.*, 16 Cal. App. 4th at 1815. In this case, the Dismissal Agreement did not contain a fee-shifting clause.[11] (AA 0051.) Nor can the initial purchase contract be the basis for submitting plaintiff Habr's claims to arbitration, where there has

---

[11] To the contrary, the Dismissal Agreement required that Mr. Habr waive his entitlement to attorneys' fees and costs in connection with the Sacramento Litigation. (AA 0054-55 at ¶ 1.) No answer to the cross-complaint was ever filed (World was busy demurring), and thus no pleading ever stated a claim for either attorneys' fees or costs for World, in either the Sacramento Litigation, The Alameda Action, or the arbitration.

been a complete integration of the parties' rights in a new contract and the new contract makes no provision for the shifting of costs. The arbitration panel completely exceeded its powers by awarding the costs of arbitration to World. Accordingly, the trial court further erred by confirming an arbitration award which shifted the costs of arbitration to Mr. Habr.

E. The Arbitration Award Is In Violation of a Federal Injunction and the Bankruptcy Court's Order of Confirmation of Appellant's Plan of Reorganization, and as Such, This Court Cannot Affirm the Award.

It is [sic] has long been the rule that where an arbitration award commands an act which is contrary to law or public policy, the courts will not confirm the award. *See Black v. Cutter Laboratories,* 43 Cal. 2d 788, 799 (1955); *Pacific Gas and Elec. Co. v. Superior Court,* 15 Cal. App. 4th 576, 610 (1993), *declined to follow on another point, Advanced Micro Devices, Inc. v. Intel Corp.,* 9 Cal. 4th 362, 376-77 (1994); *Joe A. Freitas & Sons v. Food Packers, Processors and Warehsmn. Local 865,* 164 Cal. App. 3d 1210, 1219 (1985); *American and Nat. Leagues of Prof. Baseball Clubs v. Major League Baseball Players Ass'n,* 59 Cal. App. 3d 493, 498 (1976). In this case, the arbitrators' award permitted World to pursue a claim against Mr. Habr, despite the fact that the claim had already been discharged in bankruptcy. This is in direct contravention of the United States Bankruptcy Code as well as the Bankruptcy Court order confirming Mr. Habr's Plan of Reorganization.

The issue turns on the question of whether World's attorneys' fee claim arises from a contract which pre-exists the filing of Mr. Habr's Chapter 11 petition. If so, the debt is deemed to be "incurred" prior to the petition and is discharged by the confirmed plan. Under federal bankruptcy law, the attorneys' fees awarded by the arbitration panel in this case were "incurred" prior to the filing of Mr. Habr's Chapter 11 bankruptcy petition and long before the confirmation of Habr's Plan of Reorganization. *See In re Abercrombie*, 139 F.3d 755, 759 (9th Cir. 1998) (defendant prevailing in litigation against debtor plaintiff not permitted to recover as administrative expense attorneys' fees awarded against debtor where dispute arose out of real estate contract executed prior to filing of bankruptcy).[12]

A pre-confirmation claim such as this must be filed *prior* to confirmation of the debtor's plan of reorganization, even though the claim may be contingent on the outcome of pending litigation. Otherwise, it is discharged

---

[12] *In re Abercrombie* confirms that a claim which has its genesis in a pre-petition contract must be classified as a pre-petition general claim, to be asserted in the normal bankruptcy claim approval process. *In re Abercrombie*, 139 F.3d at 758. World failed to mention the claim during its many appearances in the Habr bankruptcy, and instead asserted it for the fist time during the arbitration hearing. This does not give rise to a new "administrative" claim "during the pendency of the bankruptcy" which can be asserted after World has prevailed. *Id*. The opinion of the Ninth Circuit in *In re Abercrombie* specifically rejects World's contrary view, as expressed by the lower Bankruptcy Appellate Panel in *In re Madden*, 185 B.R. 815 (9th Cir. BAP 1995). *See In re Abercrombie*, 139 F.3d at 759.

when the plan is confirmed. 11 U.S.C. § 1141(d)(1)(A).[13] World never made any such claim, despite its awareness of the litigation and participation in the Plan confirmation process. The litigation itself was repeatedly mentioned in the Plan as an asset of the bankruptcy estate. (*See* AA 0311 at ¶ 35, 0315-17 at art. VI.) Any unasserted claim by World for attorneys' fees was completely discharged upon confirmation of the Plan. 11 U.S.C. § 1141(d)(1)(A).

Habr's Sixth Amended Plan Of Reorganization was confirmed by the Bankruptcy Court on January 6, 1997. (AA 0325.)[14] It provides that any claim against the estate not made prior to confirmation is null and void:

> 13.1 The provisions of the confirmed Plan shall bind the Debtor and any creditor, whether or

---

[13] Section 1141(d)(1) provides:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation . . . whether or not –
>
> (i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;
>
> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan;
>
> . . .

11 U.S.C. §1141(d)(1).

[14] World appeared in the Habr Chapter 11 proceeding on five separate occasions objecting to proposed plans of reorganization, but at no time did it ever raise the issue of a claim for attorneys' fees or arbitration costs.

> not the claim of such creditor is impaired under the Plan and whether or not such creditor has accepted the Plan.
>
> 13.4 The Debtor is forever discharged from any and all debts that arose prior to the Confirmation Date, except for claims and/or obligations for which the Debtor shall remain responsible pursuant to the provisions of this Plan and except for any debts determined by the Bankruptcy Court to be non-dischargeable.
>
> 13.5 All creditors whose debts are discharged by the Order of Confirmation and all creditors whose judgments are declared *null and void by the Order of Confirmation shall be forever enjoined from instituting or continuing* any action or employing any process or engaging in any act to collect such debts as liabilities of the Debtor.

(AA 0320-21 at ¶¶ 13.1, 13.4-13.5 (emphasis added).)

Although the confirmed Plan specifically mentioned Mr. Habr's arbitration against World in several places, the Plan contains no provision for payment of attorneys' fees claimed against Habr in the action. World filed a claim as a creditor of the estate as well as many objections to the confirmation of the Plan in Mr. Habr's underlying bankruptcy, but never made mention of the attorneys' fees that it was incurring in connection with the arbitration.[15] As Judge Grube notes in the Order confirming the

---

[15] Nor did World ever claim attorneys' fees at any point in the Sacramento or Alameda Actions. If World intended to pursue a claim for attorneys' fees, it had a duty to reveal its intentions and submit its claim during the bankruptcy plan approval process. The creditors voting on the plan are entitled

Plan, the Plan was confirmed over World's objections; nonetheless, the Bankruptcy Code provides that World is bound by the confirmation. Accordingly, its claims are extinguished. (AA 0325); 11 U.S.C. § 1141(d)(1).

Furthernore, the Bankruptcy Statutes specifically enjoin World from "continuing any action" to collect such debts. 11 U.S.C. § 524(a)(2).[16] As a result, any attempt on World's part to recover attorneys' fees in this case is in *direct violation* of section 524(a)(2) the Code, and in violation of the Bankruptcy Court's Order confirming the Plan. *Id.* As explained above if an arbitration award "commands an act which is unlawful or against public policy, it will be vacated." *American and Nat. Leagues of Prof. Baseball Clubs*, 59 Cal. App. 3d at 498. Mr. Habr

---

to know its financial impact. World's lawyers apparently were devoting a huge amount of time in relationship to the magnitude of the proceedings. They should have revealed their scheme to assert a huge claim for fees so that the Bankruptcy Court and the creditors could adequately review the plan.

[16] This section reads:

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section . . . 1141 . . . of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not such debt is waived . . .

. . .

11 U.S.C. § 524(a), subs.(1)&(2).

immediately brought the stay of the Bankruptcy Court to the attention of the arbitration panel, but his protest fell on deaf ears. (AA 0168, 0194.) The trial court's confirmation of the panel's award of a debt which had been discharged in bankruptcy was erroneous.

The Ninth Circuit's opinion in *In re Abercrombie* holds that a claim for attorneys' fees awarded in litigation regarding a real estate contract which, as in the present case, was executed prior to the debtors' filing of a bankruptcy petition, is to be considered a claim for a debt incurred on the date the contract was executed. *In re Abercrombie*, 139 F.3d at 758-59. World is making exactly the same type of claim which was made in *Abercrombie*.[17] The attorneys' fees here are deemed to have been "incurred" on April 17, 1992, the date the agreement for the sale of Cadillac South Apartments was executed. Mr. Habr's bankruptcy petition was filed some two years later. Thus, World's claim is for a pre-petition debt which was deemed discharged upon confirmation of Mr. Habr's Plan of Reorganization. 11 U.S.C. §§ 524, 1141.

World may attempt to argue that the recent opinion in *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998), supports its position. In that case, the court upheld a post-confirmation award of attorneys' fees against a bankruptcy debtor where the award was made

---

[17] Only after the panel's interim award, counsel for World notified Mr. Habr's bankruptcy attorney that it would attempt to recover the fees by classifying them as an administrative claim in the bankruptcy case, just as occurred in *Abercrombie*. (AA 0153.) However, as explained above, the Ninth Circuit has rejected this tactic. *In re Abercrombie*, 139 F.3d at 758-59.

in litigation also arising out of a pre-petition contract. However, the Ninth Circuit's decision in *Siegel* is actually consistent with its prior opinion in *Abercrombie*, which holds *against* World, as noted above.

In *Siegel*, the debtor brought an action for breach of contract and tort against his lender charging that the lender had wrongfully recovered a deficiency judgment on his property, despite the fact that the bankruptcy court had already approved the deficiency when the lender filed a claim in the debtor's bankruptcy case, to which claim the debtor made no objection. *Siegel*, 143 F.3d at 529, 531. The lender prevailed on summary judgment in the debtor's wrongful foreclosure suit, on the basis that the bankruptcy court's prior approval of the deficiency claim was res judicata. The trial court then correctly assessed attorneys' fees because the dispute arose out of the debtor's post-bankruptcy decision *to re-assert* his objection to the claim in the form of a wrongful foreclosure proceeding. *Id.* at 528. Siegel appealed, and the Ninth Circuit affirmed, finding that the bankruptcy court's allowance of the deficiency claim was res judicata of the debtor's wrongful foreclosure action. *Id.* at 531.

On the issue of attorneys' fees, the *Siegel* court reasoned that its genesis was derived from the debtor's decision to reopen the deficiency issue *after it had already been determined by the bankruptcy court*. Thus, *Siegel* did not raise the issue of a bankruptcy discharge preventing an award of attorneys' fees. *Siegel*, 143 F.3d at 533. Recognizing that attorneys' fees arising from a pre-petition contract will be discharged in bankruptcy à la *Abercrombie*, the *Siegel* court found that the debtor's choice to revive the deficiency issue also revived his exposure for

attorneys' fees, and therefore was a post-filing decision which gave rise to liability for attorneys' fees as administrative costs. *Id; Cf. Christian Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life)*, 821 F.2d 1370, 1374 (9th Cir 1987); *and Employees' Retirement Sys. v. Osborne (In re THC)*, 686 F.2d 799, 803-04 (9th Cir. 1982). The *Siegel* court noted that but for the revival decision, the debtor would have been freed from liability, stating:

> This is a case where the debtor, Siegel, had been freed from the untoward effects of contracts he had entered into. [The lender] could not pursue him further, nor could anyone else.

Siegel, 143 F.3d at 533.

In stark contrast, World never raised the issue of attorneys' fee claims, even though it was well aware of Mr. Habr's claims related to the sale of the apartment complex. In short, it was *World* who had the opportunity to make a claim for potential attorneys' fees prior to discharge, but failed to do so. Any such claim for fees by World was fully discharged and cannot be awarded against Mr. Habr now. *In re Abercrombie*, 139 F.3d at 758-59.

The Bankruptcy Code prohibits World from asserting its claim for attorneys' fees against Mr. Habr in this case. The arbitration panel exceeded its powers by making such award – violating both the confirmation order and the injunction of section 524 of the Bankruptcy Code. Accordingly, the Arbitration Award must be vacated. Cal. Code Civ. Proc. § 1286.2(d).

VI.

CONCLUSION

The purpose of the laws governing judicial review of arbitration awards in California "is to promote contractual arbitration, in accordance with a 'strong public policy' in favor thereof [citation omitted] as a more expeditious and less expensive means of resolving disputes than litigation." *Mercury Ins. Group v. Superior Court*, 19 Cal. 4th 332, 342 (1998) (*quoting Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 322 (1983)). Moreover, it is certain that fundamental due process rights and the "elementary requirements of impartiality" are not suspended when a matter is adjudicated by way of contractual arbitration, rather than in a judicial proceeding. *See Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145, 146, 150 (1968). Here, Mr. Habr was deprived of a jury trial and forced to arbitrate a claim against his will, was forced to deposit nearly $40,000 in advance of the arbitration without prior notice (which was four times the original fee), was prevented from obtaining discovery of central evidence and witnesses in the case and was prohibited from cross-examining the primary witness in order to establish the very heart of his fraud claim. Finally, Mr. Habr was faced with a claim in the amount if $320,000 for attorneys' fees and costs arising out of a four and one-half day arbitration (without any prior notice), even though federal and state laws prohibit such a claim. Where the conduct of the arbitration has gone so completely awry, the award must be vacated.

For the foregoing reasons, plaintiff and appellant Stan Habr respectfully requests that this Court reverse the order of the trial court, vacate the arbitration award and permit plaintiff Habr to proceed to jury trial.

Respectfully submitted,

Dated: March 25, 1999

LUKENS AND DRUMMOND
WILLIAM M. LUKENS (#037196)
BRIDGET M. BARRETT (#188394)

By: /s/ William M. Lukens
Attorneys for Plaintiff
and Appellant
Stan M. Habr

LAW OFFICES OF
JOHN T. DAWSON
100 NORTH ALMADEN AVENUE
SAN JOSE, CA 95110
TELEPHONE: (408) 289-8377

Attorney for _____
Defendant/
Cross-Complainant Habr

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

WORLD SAVINGS AND LOAN ASSOCIATION, a federal savings and loan association,

Plaintiff,

v.

STAN HABR; and DOES 1 through 50, inclusive,

Defendants.

_____/

No. 531746

STAN HABR,

Cross-Complainant,

v.

WORLD SAVINGS AND LOAN ASSOCIATION, a Federal Savings and Loan Association and ROES 1-10, Inclusive,

Cross-Defendants.

_____/

FIRST AMENDED CROSS-COMPLAINT FOR BREACH OF CONTRACT, INTENTIONAL NON-DISCLOSURE OF MATERIAL FACT, RESTITUTION, AND VIOLATION OF COVENANT OF GOOD FAITH AND FAIR DEALING

Comes now defendant/cross-complainant, STAN HABR, and cross-complains and alleges of cross-defendants, and each of them, as follows:

1. Cross-defendants, Roes 1-10, Inclusive, are sued herein under fictitious names; the true names and capacities of those agents and employees of World Savings who entered into or participated in the negotiations which concluded in the sale of the subject commercial real property to Habr being unknown at this time to cross-complainant. When said true names and capacities are ascertained, cross-complainant will make amendment to his Cross-Complaint by including said true names and capacities herein.

2. At all times herein mentioned, all of the cross-defendants were each the employees, servants, agents, and joint venturers of the other cross-defendants, and acting within the scope of their employment, service, agency and joint venture, and each is legally responsible for the acts and omissions of the others.

3. At all times mentioned herein, cross-complainant, Stan Habr (hereinafter "Habr") was an individual residing in Santa Clara County, California.

4. At all times mentioned herein, cross-defendant World Savings and Loan Association (hereinafter "World") was a federal savings and loan association licensed to do business in the State of California.

5. Plaintiff/cross-defendant, World, has heretofore filed an action for damages against defendant/cross-complainant Habr and unnamed others in the above-entitled

action. Without admitting the truth of any of the allegations of said Complaint, the allegations of said Complaint are incorporated herein by reference as though fully set forth.

6. During the months of February and March 1992, Habr and World entered into protracted negotiations for the sale and purchase of commercial and real property legally described in World's Complaint, and commonly referred to and known as Cadillac South Apartments, 5900 Riza Ave., Sacramento, CA (hereinafter "the subject property.")

7. The parties hereto entered into a contract and executed documents, and escrow closed by the middle of April 1992. A copy of that initial contract dated February 24, 1992, and the subsequent counter-offers thereto are affixed to this First Amended Cross-Complaint as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", and "I", Inclusive, with the intent to incorporate herein as though fully set forth.

8. Pursuant to the initial Real Estate Purchase Contract and Receipt for Deposit dated February 24, 1992, running to five pages, cross-defendant World warranted that:

> 5. TITLE: Title is to be free of liens, encumbrances, easements, restrictions, rights and conditions of record or known to seller other than the following: (A) current property taxes, (b) covenants, conditions, restrictions and public utility easements of record, if any, provided the same do not adversely effect the continued use of the property for the purposes of

which it is presently being used, unless reasonably disapproved by buyer in writing within 10 calendar days of receipt of a current preliminary report furnished at seller's expense, and (c) . . . READ PARAGRAPH 18 FOR IMPORTANT TERMS.

17(B) (2). "CONDITION OF PROPERTY": Seller warrants, through the date possession is made available to buyer: (2) the roof is free of all known leaks, and (3) built-in appliances and water, sewer/septic, plumbing, heating, electrical, air conditioning, pool/spa systems, if any, are operative . . .

17(D). "SELLER REPRESENTATION": Seller warrants that seller has no knowledge of any notice of violations of city, county, state, federal, building, zoning, fire, health codes or ordinances, or other governmental regulation filed or issued against the property.

17(K) "RENTAL/SERVICE AGREEMENTS": Within 15 calendar days of acceptance of the offer, seller shall make available to buyer for inspection and review: (2) a rental statement, including names of tenants, rental rates, period of rental, date of last rent increase, security deposits, rental concessions, rebates or other benefits, if any, and a list of delinquent rents and their duration. Seller represents that no tenant is entitled to any rebate, concession, or other benefit except as set forth in the documents to be furnished.

9. Within approximately three weeks of the close of escrow, Habr found that World, without justification or excuse, breached those material covenants so enumerated by not disclosing or misrepresenting the following facts:

(A) That on or about January 17, 1991 the City of Sacramento had filed suit against the then owners of the subject property for abatement of public nuisance, injunctive relief and damages, violation of statutory duty – Health & Safety Code §§ 17980.6 and 17980.7, and for a receivership. This case had been filed in the Superior Court of California, in and for the County of Sacramento, as Case #518358, entitled *City of Sacramento, a municipal corporation v. Cadillac South Apartments, et al.* Habr was first told of such a lawsuit at the time of the signing in escrow, and then it had been represented to him by World's agent as originating from the illicit traffic in drugs on the subject property.

(B) A representative from the Dangerous Housing Department for the City of Sacramento informed habr that said suit was still pending and had been on the property for approximately one year. Further, the city's representative informed Habr that he had three weeks to correct the enumerated violations in the City of Sacramento suit, or the subject property would be bulldozed.

(C) Four complexes were leaking and had to be completely re-roofed.

(D) Pursuant to the rent role provided to Habr by World's agent indicating tenancy as of March 23, 1992, fifteen to twenty units were not disclosed to be delinquent and/or occupied by tenants that should never have been permitted to rent, and who were subsequently evicted from the property for non-payment of rent.

(E) At least fifteen units of the subject complex were in an undisclosed state of severe disrepair and dilapidation.

10. World knew or should have known of the actual condition of the subject real property, the status of the City of Sacramento's lawsuit, and the qualifications of the tenants on the subject property because World was the owner of the property and had recently reacquired the subject property in a foreclosure sale.

FIRST CAUSE OF ACTION

(Breach of Contract)

11. Cross-complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 10 hereinabove as though fully set forth.

12. On or about April 17, 1992, Habr executed escrow documents and purchased the subject property from world, pursuant to the written contract. Pursuant to the contract and the escrow instructions, Habr, at that time, made his required down payment.

13. The initial purchase contract in five pages, dated February 24, 1992, Exhibit "A" hereto, was initialled by Habr incorporating the warranties of Paragraph 17 into the agreement. A copy of this initial purchase contract was sent by fax to World. World allegedly executed but failed to return the contract, and apparently did not initial Paragraph 17. On or about February 26, 1992, world counter-offered, modifying terms relating to price, terms of payment, commissions and dates of escrow (Exhibit "B"). In addition to these modifications the counter-offer reads, "the balance of the contract not in contravention hereto, to remain the same."

14. By its silence and failing to return the initialled purchase contract to Habr, and by its counter-offer of February 26, 1992 incorporating all terms and conditions of the purchase contact [sic] not thereby modified, World agreed to and warranted those terms and conditions as expressed in Paragraph 17 of the initial purchase contract.

15. By the actions alleged in Paragraph 9 above, World breached the purchase contract, specifically those warranties, and terms and conditions set forth in Paragraphs 5 and 17 (B) (2), (D), and (K).

16. Within approximately a three week period, Habr learned of these breaches and material misrepresentations by World and expended money to immediately make undisclosed but necessary repairs in an amount according to proof. Said expenditures are within the jurisdiction of this court.

17. In addition to making repairs, Habr was given the option by the city of Sacramento to apply to the Sacramento Housing & Redevelopment Agency for a rehabilitation loan for funding to rehabilitate the Cadillac South apartment complex. It was represented to Habr by employees of the City, and he understood it to be, the only recourse to stay the scheduled demolition of several of the complexes on the subject property.

18. Within a short period of time, Habr also had to begin eviction proceedings on fifteen to twenty units for non-payment of rent.

WHEREFORE, cross-complainant prays for relief pursuant to California Civil Code § 3306 as set forth hereinbelow.

SECOND CAUSE OF ACTION

(Intentional Non-Disclosure of Material Fact)

19. Cross-complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 18 hereinabove, as though fully set forth.

20. During the entire period of negotiation for the sale and purchase of the subject property, seller World misrepresented or failed to dislcose the existence of a City of Sacramento lawsuit for public nuisance and nuisance per se, and violation of various Health and Safety Code statutes on the subject property. World failed to disclose the actual condition of the roofs on many of the complexes on the subject property and the fact that the roofs had to be completely replaced. Seller, World, failed to disclose that the rent role presented to buyer, Habr, by World was padded or inflated with renters who were delinquent or who were unsuited as tenants and had to be immediately evicted from the subject property. World misrepresented or failed to disclose that fifteen additional units were in serious disrepair.

21. World was aware of the City of Sacramento lawsuit on the subject property; and having recently, before the sale to Habr, taken the subject property back in foreclosure, knew their representations made to Habr were false and also knew of additional material defects which were not disclosed to Habr.

22. On information and belief, Habr alleges that seller, World, intentionally misrepresented and withheld such information to induce him to purchase the property quickly so that it might be removed from the accounting and books of World by the conclusion of the first quarter of 1992.

23. Habr reasonably relied upon the omissions and misrepresentations of World, and not knowing of the material omissions, entered into contract and purchased the subject property and was consequently and subsequently damaged as hereinabove alleged. Moreover, these acts by World were willful, wanton, malicious, and oppressive, and were undertaken with the intent to deceive, such that they justify the awarding of exemplary and punitive damages in an amount to be ascertained at trial.

WHEREFORE, cross-complainant prays for relief pursuant to California Civil Code § 3343 as set forth hereinbelow.

THIRD CAUSE OF ACTION

(Negligent Misrepresentation of Material Fact)

24. Cross-complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 23 hereinabove, as though fully set forth.

25. Pursuant to the negotiations for the sale and purchase of the subject property, World misrepresented the legal and physical status of the property, and inflated rent roles. Such representations were material and false.

World either knew of their falsity or made such misrepresentations without reasonable grounds for believing them to be true, with the intent to induce Habr to purchase the subject property.

26. In reliance upon these misrepresentations, Habr reasonably relied upon the information provided to him, and consequently and subsequently incurred those damages as have been heretofore enumerated. Moreover, these actions and omissions by World were willful, wanton, malicious, and oppressive, and were undertaken with the intent to deceive, such that they justify the awarding of exemplary and punitive damages in an amount to be ascertained at trial.

WHEREFORE, cross-complainant prays for relief as hereinafter set forth.

FOURTH CAUSE OF ACTION

(Restitution)

27. Cross-complainant incorporates the foregoing allegations contained in Paragraphs 1 through 26 hereinabove, as though fully set forth.

28. From the date of learning of the material misrepresentations and non-disclosures concerning his purchased property and his application to the City of Sacramento for a rehabilitation loan, Habr began negotiations with World in an attempt to establish some type of deferred payment schedule which would permit him to make the necessary but undisclosed repairs, solicit appropriate tenants, and secure the rehabilitation loan. These

negotiations endured for approximately three months and were terminated by World.

29. Therefore, Habr has no alternative but to give World notice of rescission, and to pray for relief pursuant to California Civil Code §1692.

WHEREFORE, cross-complainant prays for relief as hereinafter set forth.

FIFTH CAUSE OF ACTION

(Violation of Covenant of Good Faith and Fair Dealing)

30. Cross-Complainant hereby incorporates the foregoing allegations contained in Paragraphs 1 through 29 hereinabove, as though fully set forth.

31. In and through their misrepresentations and omissions of material fact, World has breached the implied covenant of good faith and fair dealing that the contract for the sale and purchase of the subject commercial real property would normally contain. Specifically, because of the unanticipated expenses occasioned by World's misrepresentations and omissions, and by its actions has alleged in Paragraph 26 above, Habr was unable to manage the subject property and realize the benefit of his bargain, and at the same time, honor his mortgage obligations to World.

32. Habr, in good faith and in reasonable reliance upon the representation and word of World, entered into and executed the contract for purchase and sale of the subject property, and attempted to manage the subject property. He would not have done so if he had known the

true condition and status of the subject property, and the hidden costs therein.

WHEREFORE, cross-complainant prays for relief as set forth below.

First Cause of Action:

1. Actual and compensatory damages according to proof and in an amount in excess of the jurisdictional limitation of this court;

2. Consequential damages according to proof;

3. Interest at the legal rate from April 1, 1992; and

4. Attorney's fees pursuant to contract.

Second Cause of Action:

5. Actual and compensatory damages according to proof;

6. Consequential damages, including lost profits from the subject property from the date of purchase, according to proof;

7. Reasonable attorney's fees pursuant to California Code of Civil Procedure §1021; and

8. Exemplary or punitive damages as this court deems just and proper.

Third Cause of Action:

9. Actual and compensatory damages according to proof;

10. Consequent damages, according to proof;

11. Interest at the legal rate from April 1, 1992;

12. Reasonable attorney's fees pursuant to California Code of Civil Procedure § 1021; and

13. Exemplary or punitive damages as this court deems just and proper.

Fourth Cause of Action:

14. Rescission of that sales and purchase contract for the subject real property;

15. Restitution and compensatory damages according to proof in an amount in excess of $350,000.00;

16. Consequential damages, according to proof, including reasonable attorney's fees; and,

17. Interest at the legal rate from April 1, 1992.

Fifth Cause of Action:

18. Actual and compensatory damages according to proof and in an amount in excess of the jurisdictional limitation of this court;

19. Consequential damages according to proof;

20. Interest at the legal rate from April 1, 1992; and

21. Attorney's fees pursuant to contract.

DATED: June 8, 1993.

/s/ W. Kenneth Howard
W. KENNETH HOWARD, ESQ.
Attorney for Cross-Complainant
STAN HABR